87-2008

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1987

VIRGIN ISLANDS BAR ASSOCIATION,

Petitioner,

vs.

SUSAN S. ESPOSITO [Thorstenn] and LLOYD DE VOS

Respondents,

and

GEOFFREY W. BARNARD,
in His Capacity as Chairman of the Committee
of Bar Examiners of the Virgin Islands Bar,
and Not Personally,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER IT WAS AN INCORRECT APPLICATION OF A SUPREME COURT PRECEDENT, i.e., *FRAZIER V. HEEBE*, 107 S.Ct. 2607 (1987), FOR THE COURT OF APPEALS FOR THE THIRD CIRCUIT TO APPLY ITS SUPERVISORY POWERS TO INVALIDATE THE BAR RESIDENCY REQUIREMENTS TO PRACTICE LAW IN THE UNINCORPORATED TERRITORY OF THE U.S. VIRGIN ISLANDS.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case.

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OPINIONS BELOW

The opinions below include that of the District Court of the Virgin Islands granting summary judgment to the defendants, the opinion of the Court of Appeals for the Third Circuit reversing the District Court of the Virgin Islands, and the *en banc* opinion of the Court of Appeals for the Third Circuit reversing the decision of the District Court of the Virgin Islands. These opinions are included in the Appendix.

JURISDICTION

The decision sought to be reviewed is the *en banc*, opinion of the Court of Appeals for the Third Circuit filed on March 31, 1988. The Court of Appeals issued an order staying its mandate on April 29, 1988.

The jurisdiction of the Court is founded upon 28 U.S.C.A. §1254(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Art. IV § 2, Privileges and Immunities provides in pertinent part:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States statutes involving supervisory powers of the Supreme Court. 28 U.S.C.A. § 2071, § 2072 (1982).

United States statutes involving the supervisory powers of the Court of Appeals. 28 U.S.C.A. § 1254 (1966), 28 U.S.C.A. § 1291 (1987 Cum. Supp.).

Revised Organic Act of the Virgin Islands of 1954 §§ 21 through 23(a) codified at 48 U.S.C.A. §§ 1611-1613(a) (1987).

V.I. Code Ann. tit. 5 App. V Rules 51 and 56(b) (1982)

All of the above statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

The Virgin Islands Bar Association petitions for review of an *en banc* Opinion of the United States Court of Appeals for the Third Circuit reversing the Judgment of the District Court of the Virgin Islands. Respondents, Susan Esposito [Thorstenn] and Lloyd de Vos, were denied admission to the Bar of the United States Virgin Islands because they did not comply with the Bar residency requirements. As a result, they filed actions in the District Court of the Virgin Islands alleging that the residency requirements violated the privileges and immunities clause of the United States Constitution and they sought to enjoin the enforcement of the residency rules. Both plaintiffs, Thorstenn and de Vos, and the defendants, Geoffrey Barnard, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar Association, and the Virgin Islands Bar Association (which the District

Court had permitted to intervene as a defendant), filed motions for summary judgment with supporting affidavits.

The District Court granted the defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirements, and that those requirements did not violate the privileges and immunities clause, as applied in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985). In support of its conclusion, the District Court relied upon the Virgin Islands geographical isolation, the delay in publication of local decisions, the case load in the District Court, the need to monitor the professional conduct of the bar, and the rule governing the mandatory appointment of counsel for indigent criminal defendants. The jurisdiction of the District Court was founded on 48 U.S.C.A. § 1612(b)(1987) and V.I. Code Ann. tit. 4 §32 (1982).

On appeal, the Court of Appeals for the Third Circuit reversed in an Opinion filed September 30, 1987. Thereafter, a Petition for Rehearing was granted and the *en banc* Opinion, which reversed the Judgment of the District Court, was filed on March 31, 1988. Jurisdiction was founded upon 28 U.S.C.A. § 1291 (1987 Cum. Supp.). The Third Circuit concluded that the Supreme Court's ruling in *Frazier v. Heebe,* 107 S.Ct. 2607 (1987) required that it invalidate the Virgin Islands bar residency requirements pursuant to its supervisory powers. This Petition for Certiorari follows.

ARGUMENT

THE COURT'S SUPERVISORY POWER SHOULD NOT BE USED TO INVALIDATE A TERRITORY'S BAR RESIDENCY REQUIREMENT.

In this case, the Third Circuit Court of Appeals felt compelled by the Supreme Court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), to apply its supervisory power and invalidate the Virgin Islands Bar residency requirements. (App 8a, 9a)

In *Frazier*, an attorney who lived in Mississippi and was a member of both the Mississippi and Louisiana state bar associations applied for admission to the bar of the United States District Court for the Eastern District of Louisiana. His admission was rejected because he did not comply with the attorney residency and office requirements contained in the local rules of the District Court. The Supreme Court invoked its supervisory authority to "prohibit arbitrary discrimination against members of the Louisiana bar, residing and having their office out of state, who are otherwise qualified to join the bar of the Eastern District." 107 S.Ct. at 2611, 2612.

In *Frazier*, the Supreme Court noted that while its supervisory power over federal courts allows it to intervene to protect the federal system, "its authority over state court bars is limited to enforcing federal constitutional requirements". 107 S.Ct. at 2612, n. 7.

The Rules of the District Court of the Virgin Islands apply to both the district and territorial courts. Rule 51(b) requires all attorneys who practice law in

the Virgin Islands to be active or governmental members of the Virgin Islands Bar Association (App 76a). Rules 56(b)(4) and (5) require bar applicants to have resided in the Virgin Islands for at least one year immediately preceding proposed admission to the Virgin Islands Bar Association, and to have an intention to continue to reside and practice law in the Virgin Islands if admitted to practice (App 79a).

The territorial courts of the Virgin Islands have been established by and are governed by local law and are thereby similar to state courts. In the Revised Organic Act of the Virgin Islands of 1954, Congress provided that "the legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and law of the United States does not have exclusive jurisdiction". 48 U.S.C.A. §1611 (b) (1987); Moreover, it further provided that "the rules governing the practice and procedure of the courts established by local law shall be governed by local law or the rules promulgated by those courts." 48 U.S.C.A. §1611 (c) (1987).

The District Court of the Virgin Islands is not a United States District Court. It was created by Congress and exercises exclusive federal jurisdiction in the territory of the Virgin Islands under the Revised Organic Act of the Virgin Islands. 48 U.S.C.A. § 1611, § 1612(a) (1987). It is also a court of general subject matter jurisdiction in the territory and has criminal jurisdiction including offenses against the criminal laws of the Virgin Islands. 28 U.S.C.A. § 1612 (b) and

(c) (1987). It also functions as an appellate court to the territorial courts. 48 U.S.C.A. § 1613 (a) (1987). When sitting in the capacity of an appellate court it is more akin to a territorial court, than to a federal appellate tribunal. In re *Alison*, 837 F.2d 619, 622 (3d Cir. 1988).

In Title VII of Pub.L.98-454, Congress amended judiciary provisions of the Organic Act of the Virgin Islands, 48 U.S.C.A. § 1611 et seq., (1987), extending greater self governing judicial power to the territory. Rules concerning the practice and procedure of the courts established by local law are now to be governed by local law or by the local courts. 48 U.S.C.A. §1611 (c) (1987).[1] Further, Congress empowered the Virgin Islands legislature to establish a local appellate court. 48 U.S.C.A. § 1611(a) (1987). In discussing the effect of this appellate court the Third Circuit has stated: "The relationship between such a local appellate division and the federal courts would hereafter be governed by the laws of the United States pertaining to the relations between the courts of the United States and those of the several states," In re *Alison*, 837 F.2d 619, 621 (3d Cir. 1988).[2]

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[1] Section 23 of the Revised Organic Act of 1954 was amended in 1984. Prior to the amendment, Section 23 empowered the District Court to establish the rules governing the practice and procedure of the inferior courts of the Virgin Islands. V.I. Code Ann. Vol. 1 Revised Organic Act of the Virgin Islands § 23 (1967).

[2] Until the Virgin Islands legislature establishes the Appellate Court, appeals from the territorial courts are heard by the appellate division of the District Court of the Virgin Islands. 48 U.S.C.A. §1613(a) (1987).

In keeping with Congressional intent to give more autonomy to the courts of the Virgin Islands, the bar residency requirements applicable to the courts of the Virgin Islands are more reasonably subject to the standards applied to state courts than to those applied to federal district courts. As the Court stated in *Frazier*, "[r]ules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from state to state". 107 S.Ct. 2612 n. 7.

If the appeals court would have applied the standards used to review state bar residency requirements to review the bar residency requirements of the Virgin Islands, it would have limited its authority to enforcing federal constitutional requirements. As the Court said in *Frazier:*

> "The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state court bars is limited to enforcing federal constitutional requirements. Because of these differences, the Court has repeatedly emphasized, for example, that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." (citations omitted) 107 S.Ct. at 2612 n.7.

Constitutional guidelines applicable to bar residency requirements have been set forth in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In addition, the Court has also recently heard arguments in *Supreme Court of Virginia v. Friedman* (No. 87-399) (argued Mar. 21, 1988).

In *Piper,* the Supreme Court held that the exclusion of a nonresident from admission to the New Hampshire bar violated the privileges and immunities clause of the United States Constitution. The court noted, however, that the privileges and immunities clause was not absolute and did not preclude discrimination against nonresidents where there is a substantial reason for the difference in treatment and the discrimination bears a substantial relation to the Court's objective.

Applying the *Piper* standards to the Virgin Islands, the District Court concluded that the territory's residency requirements do not violate the privileges and immunities clause. The District Court found that the territory's geographic isolation and the attendant difficulties in transportation and communication justify the residency requirements (App 67a).

In its opinion the Court of Appeals does not suggest the territory's residency requirements are constitutionally infirm. Instead, the Appeals Court applied the *Frazier* standards applicable to federal district courts to find the territory's residency requirements "unnecessary and irrational", although it had no information about any pro bono or other obligations imposed by the territorial court on attorneys practicing before it. Application of these standards intended for federal district courts were inappropriately applied to the territory of the Virgin Islands by the Third Circuit through the application of its supervisory powers. Wherefore, petitioner requests that its Petition for Certiorari be granted.

Date: June 6, 1988

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3034
No. 87-3035

SUSAN ESPOSITO [Thorstenn]
LLOYD DE VOS

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

and

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant-Intervenor

Susan Esposito Thorstenn
and Lloyd De Vos, Appellants

Appeal from the District Court
of the Virgin Islands--St. Thomas

D.C. Civil No. 85-0206
D.C. Civil No. 85-0207

Argued: April 28, 1987
(Opinion Filed September 30, 1987)
BEFORE: SEITZ, HIGGINBOTHAM, and ROSENN, *Circuit Judges*.

Rehearing in Banc December 16, 1987

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSENN, *Circuit Judges*.

(Opinion Filed March 31, 1988)

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Plaintiffs, Susan Esposito Thorstenn and Lloyd De Vos, appeal the order of the district court granting the defendants' motion for summary judgment and, in effect, denying the plaintiffs' motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Thorstenn and De Vos applied for admission to the bar of the Virgin Islands. Thorstenn is a resident of

New York; De Vos is a resident of New Jersey. Both are members in good standing of the New York and New Jersey bars.

Under the Rules of the District Court of the Virgin Islands, an applicant must live in the Virgin Islands for one year before applying for admission to the bar, and must state his or her intention to reside in the Virgin Islands. 5 V.I.C., App. V, Rule 56(b)(4), (5). Because Thorstenn and De Vos did not comply with these residency requirements, they were denied admission to the Virgin Islands bar.[1]

The plaintiffs filed these actions, alleging that the residency requirements of the Virgin Islands violated the privileges and immunities clause of the constitution and seeking to enjoin the enforcement of such rule.[2] Both the plaintiffs and the defendants filed motions for summary judgment with supporting affidavits. Plaintiff De Vos reported that he had not experienced trouble travelling to the Islands. In contrast, Barnard, chairman of the Committee of Bar Examiners, in his affidavit, maintained that travel service between the continental United States and the Virgin Islands was difficult and erratic. The parties also disagreed about the quality of telecommunications between the Islands and the mainland. In view of our disposition of the legal issue presented in this case, however, we do not believe that the parties'

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1. The district court permitted the plaintiffs to sit for the Virgin Islands bar examination, while reserving the issue of their eligibility for admission to the bar. Both plaintiffs passed the bar examination. Thus, there is no dispute that the only reason they were denied admission is because they are nonresidents of the Virgin Islands.

2. The privileges and immunities clause of the United States Constitution has been extended to the Virgin Islands by the Revised Organic Act. 48 U.S.C. § 1561 (1982).

disagreement over the ease of travel and communications between the Virgin Islands and the continental United States creates an issue of material fact.[3]

The district court granted the defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirements, and thus the requirements did not violate the privileges and immunities clause as applied in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In support of this conclusion, the district court relied on the geographical isolation of the Virgin Islands from the continental United States, the delay in publication of local decisions, the case load in the district court, the need to ensure that its lawyers are ethical, and the rule governing the appointment of counsel for indigent criminal defendants. These appeals followed.

While these appeals were pending, the Supreme Court of the United States handed down its decision in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987). The Court, relying on its supervisory power, invalidated certain attorney residency and office requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana. Because of the established policy favoring a non-constitutional disposition, if possible, we address the applicability of *Frazier v. Heebe* to this appeal.

The petitioner in *Frazier* was a Mississippi attorney. He applied for admission to the bar of the United States District Court for the Eastern District of

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3. While Judge Becker believes that there may be a case in which problems with travel or communications might create an issue of material fact, he believes that no such issue is created by what he deems to be the conclusory affidavits filed by the defendants here. *Cf.* Fed. R. Civ. P. 56(e).

Louisiana. His application was rejected because he admittedly did not comply with the provisions of the local rules noted above.

The district court and the court of appeals refused to invalidate the local rules. Those courts concluded that the requirements facilitated the efficient administration of justice because nonresident attorneys allegedly are less competent and less available to the court than are resident attorneys. The Supreme Court granted certiorari. *Frazier v. Heebe*, 107 S. Ct. 454 (1986). It thereafter decided that "[p]ursuant to our supervisory authority, we hold that the district court was not empowered to adopt its local rules to require members of the Louisiana bar who apply for admission to its bar to live in or maintain an office in Louisiana where the court sits." 107 S. Ct. at 2611. It found that the reasons given for the residency requirement were unnecessary and irrational.

First, the Court stated that no empirical evidence demonstrated why the district court was justified in discriminating against one of two classes of attorneys who were members of the Louisiana bar. The Court went on to say that there is no reason to believe that nonresident attorneys who have passed the Louisiana bar examination are less competent than resident attorneys. 107 S. Ct. at 2612-13. There is no suggestion that the situation is otherwise in the Virgin Islands.

The Court next concluded that it did not agree that the alleged need for immediate availability of attorneys in some proceedings requires a blanket rule that denies all nonresident attorneys admission to a district court bar. *Id.* at 2613. The Court pointed out that improvements in communications minimize the problem of availability, and that alternative resolutions are possible.

The Court thereupon held that the residency requirement imposed by the Eastern District was unnecessary and arbitrarily discriminated against out-of-state attorneys.

The reasons advanced here by the district court, the appellees and the amicus curiae, the Government of the Virgin Islands, in support of the validity of the local rules for the district court of the Virgin Islands are essentially the same as those rejected for lack of inherent merit in *Frazier*. Indeed, the district court found that the most compelling reason for excluding nonresidents was the need to have counsel available in criminal cases. The Supreme Court, however, concluded that alternative resolutions of this problem are the answer.

We have no doubt that alternative rules could validly be adopted that would impose reasonable requirements on non-resident members of the Virgin Islands bar to assure that they would bear professional responsibilities comparable to those now imposed on resident attorneys. In consequence, non-resident members of the bar would not have a privileged status in the practice of law in the Virgin Islands. We further note that reasonable rules could be adopted to relieve the Government of the Virgin Islands of any undue expenses resulting from the admission of non-resident attorneys.

We emphasize that the Court invoked its supervisory power in *Frazier v. Heebe*. Moreover, we are convinced that the Supreme Court of the United States did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented. Such a view would create the possibility of litigation with respect to every federal district having a residence requirement.

We conclude that *Frazier* must be viewed as generally applicable to the United States district courts. We have no doubt, therefore, that it is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise. The District Court of the Virgin Islands is, of course, not a United States district court. It was created by an act of Congress and exercises exclusive federal jurisdiction in that Territory under the Revised Organic Act, 48 U.S.C. § 1612 (1982).

Given the integrated status of the Virgin Islands in the federal court system, 28 U.S.C. §§ 1254, 1291 (1982), we have no doubt that the United States Supreme Court has supervisory authority over the District Court of the Virgin Islands. Under 28 U.S.C. § 2071 (1982), local rules adopted by United States courts, including those of the District Court of the Virgin Islands, must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." *See also* 28 U.S.C. § 2072 (1982). We thus conclude that the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of 5 V.I.C., App. V, Rule 56(b)(4), (5) to the extent that they require an applicant to live in the Virgin Islands for one year before applying for admission to the district court bar and to state that it is his or her intention to reside in the Virgin Islands.[4]

The appellees argue that the supervisory power should not be exercised to invalidate the residency requirements because the supervisory power is to be used only in unique circumstances, usually criminal cases. This argument, however, is unpersuasive in

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4. In addition, appellants attack the validity of District Court Rule 16. *See* 5 V.I.C., App. V, Rule 16. We think this matter is better left for further consideration by the district court in light of the basic determination of this case.

light of the decision by the Supreme Court to employ its supervisory power to invalidate the residency requirement imposed by the Eastern District of Louisiana. Indeed, the dissent in *Frazier* focused on whether it was appropriate to rely on the Court's supervisory power in the case. *See* 107 S. Ct. at 2614-16 (Rehnquist, C.J., dissenting).

Moreover, we disagree with the appellees' and the amicus curiae's[5] assertions that the facts in this case dictate a different result than that reached by the Supreme Court. As indicated above, the justifications offered by the district court in this case were essentially the ones rejected in *Frazier*. Even against the remote possibility that we are not bound to apply *Frazier v. Heebe* here, we believe that in the exercise of our clearly established supervisory power over the District Court of the Virgin Islands, *Government of the Virgin Islands v. Bryan*, 818 F.2d 1069 (3d Cir. 1987), we would be compelled, by parity of reasoning to that employed in *Frazier*, to apply our supervisory power, *see LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), to invalidate the residency requirements in the rules.[6]

Accordingly, the judgment of the district court will be reversed and the case remanded with instructions to enter summary judgment in favor of the plaintiffs.

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5. Stressing the need for accessability and availability of attorneys, the amicus curiae largely reiterates the position of the appellees.

6. In view of our determination, we need not resolve the constitutional attack on the rules based on the privilege and immunities and equal protection clauses.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting, with whom WEIS, GREENBERG, HUTCHINSON and SCIRICA, *Circuit Judges*, join:

I believe that the majority's reliance on *Frazier v. Heebe*, ___ U.S. ___, 107 S. Ct. 2607 (1987), is flawed. More than two centuries ago Lord Mansfield, perhaps England's wisest jurist,[1] stressed that

> [p]recedents only serve to illustrate principles, and to give them a fixed authority. But the law . . . . exclusive of positive law enacted by statute, depends upon principles, and these principles run through all the cases according as the *particular circumstances* of each case have been found to fall within one or the other of them.

Jones v. Randall, 98 Eng. Rep. 954, 955 (1774) (emphases added). The "particular circumstances" of *Frazier* are so dissimilar from those of the instant case that to rely on *Frazier* is to exceed the limits of its logic and to adopt a mechanical jurisprudential approach.[2] Esposito and De Vos' location 1,668 miles from the Virgin Islands is so unlike Frazier's location 110 miles from New Orleans that this Virgin Islands case does not fall anywhere near the "particular circumstances" eliciting the Supreme Court's exercise of supervisory power in *Frazier*.

Two facts permeate any examination of the district court's residency requirements for admission to the Virgin Islands bar: the territory of the Virgin Islands is

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1. *See* W. Holdsworth, Some Makers of English Law 161-62 (1938); C. Fifoot, Lord Mansfield (1936); F. Birkenhead, 14 English Judges 180 (1926).

2. *See* Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 605-08, 613, 620-21 (1908); R. Aldisert, The Judicial Process 303-14 (1976).

a setting significantly different from any found in the forty-eight contiguous states, and the District Court of the Virgin Islands is distinct from any federal district court located in the continental states. In my view, these differences transform *Frazier* into merely relevant, not controlling, authority. *Frazier* permits us to exercise our discretionary supervisory power to strike down a residency requirement; on these facts, we should decline to do so.

As disturbing as the majority's eagerness to overlook the facts that distinguish this case from *Frazier*, however, is its disregard of the implicit basis for the *Frazier* holding. Although residency requirements for admission to a federal court's bar were set aside in *Frazier* through the mechanism of supervisory power, *Frazier* was heavily premised upon the Supreme Court's privileges and immunities analysis of a state's bar residency requirement in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Thus, even assuming that our supervisory power is properly invoked on the facts presented here, such an exercise should at least be guided by the outcome of the *Piper* legal test.

I believe that the district court properly construed the privileges and immunities clause in light of *Piper*, that *Frazier* does not meaningfully alter the applicable analysis, and that there are unresolved factual issues in this case concerning the relationship of the unique circumstances of the Virgin Islands to the challenged residency requirements. For all these reasons, I respectfully dissent.

I.

In *Piper*, the Supreme Court held that the exclusion of a nonresident from admission to the New Hampshire bar ran afoul of the privileges and immunities clause of the United States Constitution,

art. IV, § 2. The Court noted, however, that the privileges and immunities clause, "'[l]ike many other constitutional provisions, . . . is not an absolute.'" *Piper*, 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). It "does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* Applying *Piper*'s two-pronged analysis in this matter, the Virgin Islands district court concluded that the residency requirements of Rule 56, V.I.C. tit. 5, App. V (1982),[3] do not violate the privileges and immunities clause. This appeal followed.

While this appeal was pending, the Supreme Court, invoking "its inherent supervisory power to ensure that . . . local Rules [of a federal district court] are consistent with 'the principles of right and justice[]'", *Frazier*, 107 S. Ct. at 2611 (citations omitted), struck down in-state home and office requirements for admission to the bar of the United States District Court for the Eastern District of Louisiana. The Court explained that this exercise of supervisory power was intended "to prohibit arbitrary discrimination against . . . [nonresidents] otherwise qualified to join the bar." *Id.* at 2611-12. After examining the challenged requirements in light of their claimed justifications, i.e., the assertion that such requirements "facilitate the efficient

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3. Rule 56, entitled "Admission to the Bar", has two residency components. The first requires "[e]ach applicant . . . [to] have resided in the Virgin Islands for at least one year immediately preceding his [or her] proposed admission to the Virgin Islands Bar." Rule 56(b)(4), V.I.C. tit. 5, App. V (1982). The second requires that each applicant, "[i]f admitted to practice . . . , intend[] to continue to reside in and to practice law in the Virgin Islands." Rule 56(b)(5), V.I.C. tit. 5, App. V (1982).

administration of justice, because nonresident attorneys allegedly are less competent and less available to the court than resident attorneys", *id.* at 2612, the Supreme Court found "both requirements to be unnecessary and irrational." *Id.*

The result in *Frazier*, while reached through nonconstitutional judicial methods, is informed by the factual and legal framework of the earlier *Piper* decision. In each case, for instance, the Court noted the relatively minor distance between the nonresident attorney-petitioner's home and the bar that he or she was not allowed to join. *Frazier*, 107 S. Ct. at 2613 ("[petitioner's home in Mississippi] is . . . only 110 miles away" from "the New Orleans courthouse of the Eastern District"); *Piper*, 470 U.S. at 275 ("Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border"). In addition, the *Frazier* Court, citing *Piper*, stated its belief that most nonresident attorneys desiring admission to the bar would reside or practice in locations "'reasonably convenient'" to the district court. 107 S. Ct. at 2613 (quoting *Piper*, 470 U.S. at 287). It also declared, relying on *Piper*, that "a nonresident lawyer is likely to have a substantial incentive, as a practical matter, to learn and keep abreast of local rules." *Id.* (citing *Piper*, 470 U.S. at 285). Finally, in assessing the necessity and rationality of the district court rule, *Frazier* employed an "alternative means" analysis, *id.*, that is similar to the "less restrictive means" analysis of *Piper*, 470 U.S. at 284. *Frazier* did note, however, at least one distinction between the two cases:

> [r]ules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from state to state . . . . The Court's

> supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state court bars is limited to enforcing federal constitutional requirements.

107 S. Ct. at 2612 n.7.

This Court properly considers whether a non-constitutional basis, pursuant to *Frazier*, exists for disposition of this appeal. I cannot agree, however, with the majority's belief that "the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of [the Virgin Islands residency requirements]." Maj. typescript at 7. The majority asserts that *Frazier* "is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise." *Id.* at 7-8. Nevertheless, the majority discusses only one aspect of that court's status: the fact that the District Court of the Virgin Islands derives its federal jurisdiction over the territory of the Virgin Islands from the Revised Organic Act, 48 U.S.C. § 1612 (1982). Maj. typescript at 7-8; *accord Govt. of the V.I. v. Bell*, 392 F.2d 207, 209 (3d Cir. 1968).

I do not dispute that Congress intended the Virgin Islands district court, despite its unique origin,[4] to be integrated into the federal court system. Nor do I question that this Court may exercise its supervisory

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4. Although the District Court of the Virgin Islands is not a "United States District Court" created pursuant to Chapter 5 of Title 28, 28 U.S.C. §§ 81-144 (1982), it is granted all of "the jurisdiction of a District Court of the United States" by Section 22 of the Revised Organic Act, 48 U.S.C. § 1612(a) (1982). Furthermore, Title 28 specifically includes the Virgin Islands within the third judicial circuit of the United States, 28 U.S.C. § 41 (1982), and gives this Court jurisdiction to review final decisions of the Virgin Islands District Court. 28 U.S.C. §§ 1244(3), 1291 (1982); 48 U.S.C. § 1613a (c), (d) (1982).

powers over the Virgin Islands district court in appropriate contexts. *See, e.g., Government of the V.I. v. Bryan*, 818 F.2d 1069, 1074 (3d Cir. 1987) (approving Speedy Trial Plan of the District Court of the Virgin Islands); *Government of the V.I. v. Romain*, 600 F.2d 435, 437 (3d Cir. 1979) (applying criminal procedure "rule adopted by the Supreme Court under its supervisory power over the courts of the United States and, thus, applicable to the courts of the Third Federal Judicial Circuit, of which the District Court of the Virgin Islands is one"). What the majority omits from its discussion of *Frazier*, however, are the factual aspects of that decision that I find dispositive in deciding that we should not employ our discretionary supervisory powers in this instance. First, the *Frazier* Court made factual assumptions that are simply not transferrable to the unique setting of the Virgin Islands. Second, *Frazier* was based on factual findings that are qualitatively different from the disputed facts considered by the Virgin Islands district court. Third, the district court in *Frazier* was not located in a territory; to the extent that our exercise of supervisory power extends beyond the district court to those Virgin Islands courts that function as territorial courts, it is particularly inappropriate.

A.

In *Frazier*, the Supreme Court made a number of assumptions about the typical nonresident lawyer who desires to practice in the Eastern District of Louisiana. It stated, for example, that, "[a]s a practical matter, a high percentage of nonresident attorneys willing to take the [Louisiana] state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the District Court." *Frazier*, 107 S. Ct. at 2613 (quoting *Piper*, 470 U.S. at 286-87). Regarding the in-state office requirement, the *Frazier* Court

asserted that "there is no link between residency within a State and proximity to a courthouse." *Id.*

Although these assumptions made sense in the factual context of the *Frazier* case, they are inapposite here. The expectation that attorneys will endeavor to live in "reasonably convenient" locations, while plausible in the context of the contiguous States, is baseless here. Geographically, no such "reasonably convenient" location exists. *See* Appellee's Brief at 4 ("[a nonresident attorney] who reside[s] a short distance outside our boundaries would be a resident of the high seas"). The Virgin Islands Bar Examiner and Bar Association contend that no such location exists as a practical reality either, due to the inadequate travel and communication services that exist between the Virgin Islands and the mainland. *Id.* at 4-5. Directly at issue, therefore, is the very ability of even the most competent and otherwise available nonresident attorney to secure travel accommodations and effective communication services to the Virgin Islands on short notice.

B.

Frazier was decided on a fully developed record; the district court made relatively straightforward findings of fact after a bench trial. It was uncontested, for instance, that the petitioner's residence in Pascagoula, Mississippi, was "only 110 miles away," *Frazier*, 107 S. Ct. at 2613, from the federal courthouse in New Orleans. The sole justification proffered by the judges of the Eastern District of Louisiana for promulgating their residency requirements was their desire to promote "the efficient administration of justice." *In re Frazier*, 594 F. Supp. 1173, 1183 (E.D. La. 1984). In this regard, the *Frazier* district court found that "the relative unavailability of nonresident counsel seriously impair[ed] the

administration of justice when quick action [wa]s necessary."[5] *Id.* There was also evidence that "lawyers admitted *pro hac vice*, who neither reside[d] nor maintain[ed] an office in Louisiana, fail[ed] to comply with the local rules and impede[d] the efficient administration of justice more than members of the bar of the Eastern District." *Frazier v. Heebe*, 788 F.2d 1049, 1054 (5th Cir. 1986).

In direct contrast, the factual disputes here were resolved by the district court on cross-motions for summary judgment. The record therefore lacks the amount and quality of evidence that would tend to verify the central assertions offered by the Virgin Islands district court in support of the challenged residency requirements. As I discuss below with respect to *Piper*, these asserted justifications are more numerous and complex than those underlying the Eastern District of Louisiana rule in *Frazier*. They include not only the geographical isolation of the Virgin Islands, but also the effect that unavailable nonresident attorneys could have on the already huge caseload of the Virgin Islands district court. *Esposito v. Barnard*, Civil Nos. 206-207/1985, slip op. at 7 (D.V.I. Dec. 8, 1986), *reprinted in* Appendix ("App.") at 86; the administrative problems that would be involved in monitoring the ethical conduct of the nonresident members of the bar, *id.* at 9, *reprinted in* App. at 88;

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5. There was specific testimony concerning the problems caused by unavailability of counsel in proceedings such as emergency depositions pursuant to Fed. R. Civ. P. 30(b)(2), emergency conferences pursuant to Fed. R. Civ. P. 26(c), or conferences regarding temporary restraining orders pursuant to Fed. R. Civ. P. 65(b). In re Frazier, 594 F. Supp. at 1183-84. Other problems described included the court's increased difficulty in conforming to the requirements of Fed. R. Civ. P. 5 and 34, *id.*, and the general unwillingness of nonresident counsel to comply with the rules of the court. Frazier v. Heebe, 788 F.2d at 1056-58 (Goldberg, J., dissenting).

and the Virgin Islands' interest in the enforcement of its provisions for appointing counsel for indigent criminal defendants, Rule 16, V.I.C., tit. 5, App. V (1982). *Esposito*, slip op. at 7-9, *reprinted in* App. at 86-88. With the exception, perhaps, of the concern about the district court caseload,[6] the record evidence regarding each of these concerns differs markedly from the evidence in *Frazier*, where two district judges, two magistrates and the clerk of the Eastern District of Louisiana testified to administrative problems that are common to all federal district courts.

C.

Today's exercise of supervisory power also ignores the "lurking tension," acknowledged by Esposito and De Vos, Transcript of Argument at 9, inherent in striking down a rule promulgated by the Virgin Islands district court that also applies to the territorial courts. Rule 56 governs admission to the bar of the Virgin Islands, which includes the right to practice before the territorial courts. While there is no doubt that the district court of the Virgin Islands is a component part of our federal court system, the territorial courts are not in that same category.[7] Over thirty years ago, our colleague Judge Maris explained the duality as follows:

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6. The majority, relying on *Frazier*, treats the district court's concern about administering its huge caseload as facially invalid. *See* Maj. typescript at 9. This concern takes on a different dimension than that in *Frazier*, however, because of the absolute magnitude of the Virgin Islands district court caseload. For example, statistics available from the Administrative Office of the United States Courts indicate that, within this judicial circuit in 1983, "[t]he Virgin Islands had almost twice as many pending cases per judgeship as the next highest district . . .; almost five times as many new criminal filings per judgeship as the next highest district . . .; and the highest number of civil cases requiring disposition of the districts in the Circuit." App. at 49.

7. Judge Weis does not join this subsection.

> It is settled that Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of a state might legislate within the state . . . And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory . . . *[But t]he aim of Congress is to give the territory full power of local self-determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws, not laws of the United States.*

Harris v. Boreham, 233 F.2d 110, 113 (3d Cir. 1956) (emphases added) (citations omitted).[8]

The Revised Organic Act provides that "[t]he legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction." 48 U.S.C. § 1611(b) (1982). These territorial courts of the Virgin Islands, established by local law and exercising jurisdiction defined by local law, are analogous to state courts. Admittedly, there is an inherent ambiguity in the status of the territorial courts, for they share concurrent jurisdiction with the

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8. A footnote in *Harris* expressed this Court's refusal to

> subscribe to the statement . . that local laws continued in force in a territory by virtue of a provision of its organic act are laws of the United States. Such a view denies the existence of an independent, though delegated, sovereignty in the territory and treats its legislature as a mere federal agency.

Harris, 233 F.2d at 113 n.4.

federal district court in some areas, *see* 48 U.S.C. §§ 1611(b), 1612(b)-(c) (1982), and appeals from the decisions of the territorial courts are taken to the district court. 48 U.S.C. § 1613a (Supp. III 1985). Notwithstanding these links between the territorial courts and the federal courts (which have no analogue in the fifty states), I am convinced, as this Court was in *Harris*, that territorial law is not a subset of federal law. Moreover, the fact that Congress specifically made the privileges and immunities clause applicable to the Virgin Islands, 48 U.S.C. § 1561 (1982), indicates the existence of a non-federal element to the Virgin Islands territorial law. *Cf. JDS Realty Corp. v. Government of the V.I.*, 824 F.2d 256, 259 (3d Cir. 1987) (applying commerce clause to the Virgin Islands despite Congressional silence), *vacated and remanded*, ___ U.S. ___, 108 S. Ct. 687 (1988). For all these reasons, I believe that the territorial courts created by territorial law are not mere appendages of our federal court system. They are, instead, creatures of the territorial sovereignty of the Virgin Islands. *Cf. In re Alison*, 837 F.2d 619, 622 (3d Cir. 1988) (Virgin Islands district court, sitting as Appellate Division to territorial court, is more akin to a territorial than to a federal appellate tribunal).

Today's holding, therefore, goes far beyond the boundaries of our previous exercises of our supervisory power over the Virgin Islands district court. Unlike *Bryan*, for example, where this Court, sitting as supervisor, approved "the promulgation by the District Court of the Virgin Islands of a [Speedy Trial] plan . . . including those cases [tried in the district court] based on territorial crimes," 818 F.2d at 1073-74, the impact of today's decision will be felt not only by the Virgin Islands district court in the administration of those cases arising under federal laws, but also by the territorial courts. It is significant that *Bryan* analyzed

the legality of the application of a federal statute to crimes defined by territorial law. In so doing, we relied on *Government of the V.I. v. Ortiz*, 427 F.2d 1043 (3d Cir. 1970), and on *Government of the V.I. v. Lovell*, 378 F.2d 799 (3d Cir. 1967), where this type of analysis was a prerequisite to the exercise of supervisory power over the Virgin Islands district court.

Parsing the territorial and federal aspects of the Virgin Islands courts has practical, as well as legal, import. The admission of nonresident attorneys to the Virgin Islands bar will impose a cost not only upon the federal government but also on the territorial purse. As the Attorney General of the Virgin Islands pointed out, although "[m]any of . . . [the problems created by nonresident attorneys] can be minimized by money . . . , the cost will be substantial and will be well beyond the means of most residents of the Virgin Islands." Brief of Amicus Curiae Government of the Virgin Islands at 6. Furthermore,

> [t]he increased costs inherent in overcoming the barriers of long distances will also increase the already overburdened [Virgin Islands] [g]overnment budget. Both as the primary litigant before the courts and as the entity responsible for the operation of the Territorial Court system, the Government will be forced to assume substantially higher expenses . . . .

Id. at 7. The increased costs of any transaction, whether it be a simple "conference telephone arrangement[]", *Frazier*, 107 S. Ct. at 2613, or a complex trial, will be borne by the territorial fisc. Where even a public defender system is beyond the means of the local government, it is inappropriate for this Court to assert its supervisory powers over the district court as a basis for striking down the residency requirements for *all* the courts within the territory.

The Supreme Court even noted in *Frazier* that its authority to strike down bar residency requirements is arguably less sweeping in the context of state courts, "where laws and procedures may differ substantially from state to state", 107 S. Ct. at 2612 n.7, than it is in the federal context.

D.

Surely the *Frazier* "unnecessary and irrational" test, 107 S. Ct. at 2612, does not articulate a *per se* rule against residency requirements.[9] If anything, the instant case shows that there are wide regional differences within our federal court system. Thus, while *Frazier* recognized that federal district courts are part and parcel of a federal system in which "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries," *Frazier*, 107 S. Ct. at 2612 n.7, it also left these courts with enough flexibility to cope with the peculiar circumstances of their districts. If *Frazier* provides any guidance to the instant case, it is that we may, not must, use our inherent supervisory power to

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9. At argument, appellants Esposito and De Vos pointed to Justice White's concurring opinion in *Piper*, 470 U.S. at 288-89 (White, J., concurring), as support for their assertion that *Piper* and *Frazier* invalidated residency requirements wholesale. The Virgin Islands Bar Examiner, on the other hand, noted that, at the time of the Court of Appeals' decision in *Frazier*, there were two dozen federal district courts that had residency requirements. *Frazier*, 788 F.2d at 1054 n.7. These requirements were not explicitly invalidated by the Supreme Court, and I believe that their current vitality is an open question. In this regard, I note that the Supreme Court this Term has agreed to review a case involving a privileges and immunities clause challenge to a state bar residency requirement. Supreme Court of Va. v. Friedman, 822 F.2d 423 (4th Cir.), *cert. granted*, 56 U.S.L.W. 3312 (U.S. Nov. 3, 1987) (No. 87-399), *argued* Mar. 21, 1988, 56 U.S.L.W. 3619 (U.S. Mar. 15, 1988).

strike down improper residency requirements. If we do invoke our supervisory authority, we must discern whether the challenged residency requirements are "unnecessary and irrational", *id.* at 2612, by balancing our supervisory interest in preserving "the integrity of the federal system", *id.* at 2612 n.7, against those competing interests articulated by the district court in support of the residency requirements. "Supervisory power" has never been a synonym for raw judicial power, exercised without regard to rational judgments and in the absence of an adequate factual record.

II.

The majority's broad interpretation of the *Frazier* holding gives the Supreme Court, and this Court, unlimited 'supervisory' discretion over federal district courts in an area that has profound constitutional implications. Even if the Virgin Islands bar residency requirements are to be addressed under our supervisory power, our application of *Frazier* should be informed by the *Piper* analysis upon which *Frazier* relies so heavily. If, under the *Piper* test, Rule 56 must be struck down, I would concur in the judgment of the Court. However, the district court's application of *Piper* indicates just the opposite: Rule 56 meets the constitutional requirements of the privileges and immunities clause.

The district court, applying the two-part *Piper* test, decided this matter on cross-motions for summary judgment. Although the parties raised genuine issues of material fact that should have proceeded to trial or at least indicated the need for further discovery,[10] I believe that the district court construed the *Piper* legal test

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10. The majority contends that the appellee's affidavits were insufficient to raise genuine issues of material fact. Maj. typescript at 4 n.3. Unless the practice of giving all factual inferences to the non-moving party has lost all of its former meaning, the record compels me to disagree. The Chairman of the Committee of Bar

correctly.[11] Under the first prong of the *Piper* analysis, "[a] 'substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at

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Examiners of the Virgin Islands bar stated, *inter alia*, that (1) "particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights." App. at 55 (affidavit of Geoffrey Barnard); (2) "[i]t is often difficult to secure a long distance [telephone] connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade outs, transmission gaps, or disconnections", *id.* at 56 (same); and (3) "[m]ail delivery is often unreliable and almost always involves material delay." *Id.* (same). Similarly, the President of the Virgin Islands Bar Association stated that, "while telecommunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections." App. at 67 (Affidavit of Patricia D. Steele). These assertions are sufficient in my view to meet the requirements of Fed. R. Civ. P. 56(e) and (f); they raise genuine issues of material fact, and indicate the need for further discovery on the issue of the isolation of the Virgin Islands. The affidavits also indicate genuine issues of material fact with respect to the practical availability of less restrictive means for the accomplishment of the territory's objective. *See id.* at 56-58 (affidavit of Geoffrey Barnard); 67-69 (affidavit of Patricia D. Steele). For example, it is the Committee of Bar Examiners' position that "[t]he resources of the small Virgin Islands bar could never accommodate a serious and adequate investigation into the professional competence . . . or the ethical standards of non-resident lawyers." *Id.* at 57 (affidavit of Geoffrey Barnard).

11. The challenged prospective one year residency requirement of Rule 56(b)(4) is, as counsel for appellee conceded at argument, harder to justify under *Piper* than the Rule 56(b)(5) requirement that the bar applicant state an "inten[tion] to continue to reside in and to practice law in the Virgin Islands." I, too, have serious reservations about any blanket requirement that all applicants to the bar must reside in the Islands for one year prior to application. The validity of a less restrictive rule, however, may have deserved further development at trial.

which the [discriminatory] statute is aimed.'" *Hicklin v. Orbeck*, 437 U.S. 518-526 (1978) (citations omitted). Under the second *Piper* prong, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Id.* (citations omitted). "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Piper*, 470 U.S. at 284.

A.

With respect to the first prong of *Piper*, i.e., the requirement that there be a "substantial reason for the difference in treatment", between residents and nonresidents, 470 U.S. at 284, the district court found several "substantial reasons" justifying the residency requirements for admission to the Virgin Islands bar and noted in general that *Aronson v. Ambrose*, 479 F.2d 75 (3d Cir. 1973), "expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law [in the Virgin Islands a]re substantial." *Esposito*, slip op. at 5, *reprinted in* App. at 84. In *Aronson*, we rejected an equal protection challenge to the Virgin Islands residency requirement embodied in Rule 56, holding that the territory's geographic isolation and the attendant difficulties in transportation and communication justified the residency requirement.[12]

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12. We noted that

> as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the

In this case, the district court found that the geographic isolation of the Virgin Islands from the continental United States still justifies the exclusion of nonresident attorneys. The district court was

> unpersuaded by plaintiffs [sic] argument[] that improvements in air services and other technological advances since the *Aronson* decision have made travel and communication to the Virgin Islands easy and accessible. The number of flights to [the] Virgin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible. Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services [that] provide for the transport of materials and documents to and from the mainland.

Esposito, slip op. at 6, *reprinted in* App. at 85.

The quality and availability of travel, telephone and delivery services to the Virgin Islands are "material fact[s]", *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510 (1986), to the legal determination whether a substantial reason exists for the discriminatory treatment. The geographical isolation of the Virgin Islands may be mitigated by such services. If they are as inadequate as the district

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district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

Aronson, 479 F.2d at 78.

court perceived them to be, however, then the isolation of the Virgin Islands is certainly an "indicat[ion] that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." *Hicklin*, 437 U.S. at 525-26 (quotations omitted).[13]

The district court also found that the effect of inevitable delays caused by unavailable nonresident attorneys on the burgeoning case load of the district courts was a "substantial reason" justifying retention of the residency requirements. *Esposito*, slip op. at 7, *reprinted in* App. at 86. This determination was also rooted in the geographic isolation of the territory from the continental United States. The district court began its assessment of the probable effect of the admission of nonresident attorneys on the Virgin Islands case load by noting the "vast disparity," *id.* at 7, between the pending cases per average judgeship in the United States district courts and the pending cases per judgeship in the Virgin Islands district courts for the same year.[14] Noting the "pressing responsibility upon the judges of [the Virgin Islands] . . . to efficiently manage their caseloads," the district court explained further that "[i]nterruptions to accommodate delays

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13. It is my view that the adequacy of travel and communication services between New York City or Miami and the Virgin Islands, as raised in appellant De Vos' affidavit, App. at 39-40, tell only part of the story. At the very least, there is no guarantee that all nonresident attorneys will hail from the New York area or other well-served markets.

14. There are only two federal judges in the Virgin Islands: The Honorable Almeric L. Christian, who sits in Charlotte Amalie, and The Honorable David V. O'Brien, who sits in Christiansted. The district court noted that statistics issued by the Administrative Office of the United States Courts for the year 1983 indicate that there were, on average, 481 pending cases per judgeship in the district courts, whereas in the Virgin Islands there were 781 pending cases per judgeship. *See Esposito*, slip op. at 7, *reprinted in* App. at 86; *supra* note 4.

occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot be countenanced." *Id.* at 7, *reprinted in* App. at 86. Repeated interruptions of court proceedings to accommodate the travel difficulties and scheduling conflicts of nonresident attorneys would no doubt disrupt the efficient movement of the court's docket and thus exacerbate the already heavy case load in the Virgin Islands. In my view, preventing such an "evil", *Hicklin*, 437 U.S. at 525-26, would be a substantial reason for the discriminatory treatment of nonresidents. The absolute magnitude of the Virgin Islands district court's caseload, coupled with the travel difficulties between the mainland and the Islands, reflects why this case, unlike *Frazier*, presents a legitimate concern regarding the "efficient administration of justice." 107 S. Ct. at 2612.

The district court also mentioned the "[in]ability of the courts and the bar to monitor and insure the ethical conduct of . . . lawyers who do not reside in the territory." *Esposito*, slip op. at 9, *reprinted in* App. at 88. In *Piper*, the Supreme Court noted that "[t]he New Hampshire Bar would be able to discipline a nonresident lawyer in the same manner in which it disciplines resident members." 470 U.S. at 286 n.20. By contrast, the Virgin Islands Board of Bar Examiners and the Virgin Islands Bar Association contend that the costs and difficulty of investigating and disciplining unethical nonresident lawyers cannot be accommodated by the tiny Virgin Islands bar. App. at 56-57 (affidavit of Geoffrey Barnard); *id.* at 68-69 (affidavit of Patricia D. Steele). There is no assumption here that nonresident lawyers will be less ethical than resident lawyers. The concern expressed by the bar here is simply the added cost of disciplining

nonresident lawyers, given its limited resources and its geographic distance from those lawyers it would have to oversee.

Finally, the district court found that the "most compelling" reason, *Esposito*, slip op. at 7, *reprinted in* App. at 86, to retain the residency requirement was the Virgin Islands' interest in the enforcement of Rule 16, V.I.C., tit. 5, App. V (1982).[15] Under Rule 16, all active members of the Virgin Islands bar are appointed on a rotating basis to represent indigent criminal defendants. Once appointed, each attorney must accept the assignment. Substitution is not permitted absent a court order. Attorneys appointed pursuant to Rule 16 must "communicate with the defendant at his [or her] place of incarceration . . . no[] later than five days from the date of the clerk's mailing of the order of appointment." *Id.* Citing the delay in mail delivery, the difficulty in securing travel arrangements and the pressures of complying with the Speedy Trial Act, 18 U.S.C. § 3161 (1982), the district court concluded that Rule 16 justifies the exclusion of nonresident attorneys from the Virgin Islands bar. *Esposito*, slip op. at 7-9, *reprinted in* App. at 86-88.

Rule 16's dual goal of ensuring adequate representation for indigent criminal defendants and the full participation of all members of the Virgin Islands' bar constitutes another substantial reason for discriminating against nonresident attorneys. This is so, at a minimum, because of the high risk of (1) inadequate notice to the attorney of his or her assignment by virtue of slow mail delivery, and (2) the

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15. Rule 16 is the "[p]lan of the District Court of the Virgin Islands promulgated to implement the Criminal Justice Act of 1964." Rule 16, V.I.C., tit. 5, App. V (1982). This rule was not attacked by Esposito or De Vos in their complaints, and no attack on its validity is properly before us.

nonresident attorney's failure to comply with the communication requirement of the rule, in person or otherwise, by virtue of the inadequacy of travel and telephonic services. Esposito and De Vos do not vigorously dispute that Rule 16 is a "substantial reason" for the discriminatory treatment under the first prong of *Piper*. They reserve their most vehement attack for the district court's conclusion that, under *Piper*'s second prong, the exclusion of nonresidents bears a substantial relationship to the objective of implementing Rule 16. Specifically, they argue that there are various "less restrictive means", 470 U.S. at 284, other than exclusion of nonresident attorneys from the Virgin Islands bar, by which Rule 16 can be implemented. This contention is discussed below.

B.

The district court concluded that "the discrimination practiced against nonresidents, if indeed such be the case, is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar." *Esposito*, slip op. at 9-10, *reprinted in* App. at 88-89. Esposito and De Vos argue strenuously that, at least with respect to Rule 16, there are several less restrictive means of ensuring adequate representation to indigent criminal defendants. Among their suggestions are: (1) "assigning . . . cases to attorneys who have become members of a pool of criminal defense attorneys by virtue of their experience and willingness to participate." Appellants' Brief at 17; (2) requiring "the association of nonresident attorney[s] with [attorneys] . . . who reside[] in the territory." *id.*; (3) funding the legal representation of indigent criminal defendants by resident attorneys via interest that could be accrued on attorney trust accounts, Transcript of Argument at 15-17, or (4) funding such representation by

imposition of a license or registration fee on nonresident attorneys. *Id.* at 17.

Each of these suggested "less restrictive means" overlooks one central fact: Rule 16 ensures that *all* lawyers who benefit from being members of the Virgin Islands bar share equally and directly in the responsibility of representing indigent criminal defendants. None of the purported alternatives, in other words, offers a less restrictive means to the end of Rule 16; moreover, *Piper*'s "less restrictive means" analysis does not require a jurisdiction to give preferential treatment to nonresident members of the bar.

Notwithstanding the mandatory participation characteristic of Rule 16, the majority concludes -- without offering specific guidance -- that "alternative resolutions to this problem are the answer." Maj. typescript at 7. The majority, refusing even to analyze the district court's reasoning in the peculiar setting of the Virgin Islands, relies instead on a blanket assertion that similar arguments were rejected in *Frazier*. *Id.* at 6-7. If these "alternative resolutions" to Rule 16 are so obvious, then it is puzzling that the majority does not craft the precise rule that should be adopted by the Virgin Islands in Rule 16's place. This approach illustrates concretely the danger that "[less restrictive means] analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Piper*, 470 U.S. at 294-95 (Rehnquist, J., dissenting) (citations omitted). I cannot agree with this cursory approach to a very serious question, the resolution of which will affect profoundly the functioning of the Virgin Islands bar.

It is troubling that today's decision turns the privileges and immunities clause on its head by sanctioning discrimination *against* Virgin Islands

resident attorneys. It is even worse that the majority promotes this perverse result without even inquiring into whether nonresident attorneys from jurisdictions as far away as New York and New Jersey can assume efficiently their fair share of the obligation of a Virgin Islands lawyer in criminal appointment cases. Were the district court's construction of the facts to be proven at a trial, then the residency requirements of Rule 56 would survive scrutiny under the second prong of *Piper* and should be sustained.[16]

III.

The majority's unwillingness to confront the central factual and legal issues is a disservice to the members of the Virgin Islands bar, and more important, to the people they serve. Underlying the district court's reasoning in support of the bar residency requirement is the premise that travel and communications to the Islands are neither easy nor reliable. The majority, however, does "not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact." Maj. typescript at 4. In its view, a truly peculiar geographic setting has no relevance in determining whether a challenged residency provision violates the privileges and immunities clause or should be invalidated pursuant to our supervisory powers.

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16. I do not address the application of *Piper*'s second prong to the other "substantial reasons" advanced by the district court. I note, however, that the same resource constraints that affect the analysis of Rule 16 might be applicable with respect to the other reasons. For example, in disciplining unethical nonresident attorneys, the Virgin Islands bar could charge nonresidents an enforcement fee or discipline unethical lawyers under its disciplinary rules. *See Piper*, 470 U.S. at 286 n.20. It is unclear, however, whether these "alternatives" present workable solutions in the isolated setting of the Virgin Islands. *See supra* note 8.

No meaningful analogies can be drawn between the facts of *Piper* and *Frazier*, and those before us. Unlike New Hampshire and Vermont, or Mississippi and Louisiana, which share borders, no state or territory of the United States is contiguous to the Virgin Islands. Unlike *Piper* and *Frazier*, no two-hour highway drive can transport appellants from their resident states of New York and New Jersey to the Virgin Islands district court of St. Croix or St. Thomas. Unlike *Piper* and *Frazier*, the ability of appellants to communicate effectively with clients, other attorneys, agencies and courts, by telephone and mail services, is disputed. Most significantly, unlike *Frazier*, where petitioner stressed no less than a dozen times in his brief to the Supreme Court that his home and office were closer to the district court than were those of many resident Louisiana state bar members, appellants here are geographically further from the district court, by more than a thousand miles and an ocean, than all resident members of the Virgin Islands bar. A residency requirement predicated on these obvious facts is neither "unnecessary" nor "irrational." *Frazier*, 107 S.Ct. at 2612.

I find it particularly disheartening that the distinguished federal judges of this Court have so easily written off as irrelevant their own experiences with the transportation and communication problems that plague the Virgin Islands. Even if only some members of this Court have had the frustrating experience of mailing case files to the Virgin Islands weeks before a sitting, only to learn that they are not available when they arrive to hear argument, or have had their judicial patience tested as they have waited for the connection of a phone call between the continental United States and the Virgin Islands, we should heed Chief Justice Taft's pointed observation that "[a]ll others can see and understand this. How can we properly shut our minds to it?" *Bailey v. Drexel*

Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37 (1922), *quoted in Gomillion v. Lightfoot*, 270 F.2d 594, 608 (5th Cir. 1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339 (1960).

The ultimate tragedy of the majority's decision is that, by ignoring the lessons of experience, it unnecessarily but significantly weakens the independence and the vitality of the Virgin Islands bar. One predictable result of this decision is that those lawyers who are willing to practice full time in the Virgin Islands and to make it their primary residence will soon be required to assume a disproportionate burden of representing Virgin Islands defendants in court-appointed criminal cases. This result seems inevitable; the only question is whether local counsel will appear in their own capacity for indigent defendants or as the reluctant representatives of unavailable nonresident attorneys. The majority, perhaps unwittingly, imposes this foreseeable burden on resident attorneys solely because nonresident attorneys such as Esposito and De Vos want the advantage of a dual practice in the mainland and in the Virgin Islands, despite their inability to discharge effectively the responsibilities of the latter practice. In my view, this arrangement is too much to ask of the resident members of the Virgin Islands bar.

For all these reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3034
No. 87-3035

SUSAN ESPOSITO

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

and

LLOYD DE VOS

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

Susan Esposito Thorstenn
and Lloyd De Vos,
Appellants

Appeal from the District Court
of the Virgin Islands--St. Thomas

D.C. Civil No. 85-0206
D.C. Civil No. 85-0207

Argued: Tuesday, April 28, 1987

BEFORE: SEITZ, HIGGINBOTHAM, and ROSENN, *Circuit Judges*.

Filed: September 30, 1987

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Plaintiffs Susan Esposito Thornstenn and Lloyd De Vos appeal the order of the district court granting the defendant's motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Thorstenn and De Vos applied for admission to the bar of the Virgin Islands. Thorstenn is a resident of New York; De Vos is a resident of New Jersey. Both are members in good standing of the New York and New Jersey bars.

Under the Rules of the District Court of the Virgin Islands, an applicant must live in the Virgin Islands for one year before applying for admission to the bar, and must state his or her intention to reside in the Virgin Islands. 5 V.I.C., App. V, Rules 56(b)(4),(b)(5) (1982). Because Thorstenn and De Vos did not comply with these residency requirements, they were denied admission to the Virgin Islands bar.[1]

The plaintiffs filed these actions, alleging that the residency requirement of the Virgin Islands violated the privileges and immunities clause of the constitution and seeking to enjoin the enforcement of such rule.[2] Both the plaintiffs and the defendant filed motions for summary judgment with supporting

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1. The district court permitted the plaintiffs to sit for the Virgin Islands bar examination, while reserving the issue of their eligibility for admission to the bar. Both plaintiffs passed the bar examination. Thus there is no dispute that the only reason they were denied admission is because they are nonresidents of the Virgin Islands.

2. The privileges and immunities clause of the United States Constitution has been extended to the Virgin Islands by the Revised Organic Act. 48 U.S.C. § 1651 (1982).

affidavits. De Vos reported that he had not experienced trouble traveling to the Islands. In contrast, Barnard, in his affidavit, maintained that travel service between the continental United States and the Virgin Islands was difficult and erratic. The parties also disagreed about the quality of the telecommunications between the Islands and the mainland. In view of our disposition of the legal issue presented in this case, however, we do not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact.

The district court granted the defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirement, and thus the requirement did not violate the privileges and immunity clause as applied in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In support of this conclusion, the district court relied on the geographical isolation of the Virgin Islands from the continental United States, the delay in publication of local decisions, the case load in the district court, the need to ensure that its lawyers are ethical, and the rule governing the appointment of counsel for indigent criminal defendants. This appeal followed.

While this appeal was under advisement, the Supreme Court of the United States handed down its decision in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987). The Court, relying on its supervisory power, invalidated certain attorney residency and office requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana.

We requested and received comments from the parties on the applicability of *Frazier v. Heebe* to this case because of the established policy favoring a

non-constitutional disposition, if possible. We now address that issue.

The petitioner in *Frazier v. Heebe* was a Mississippi attorney. He applied for admission to the bar of the United States District Court for the Eastern District of Louisiana. His application was rejected because he admittedly did not comply with the provisions of the local rules noted above.

The district and circuit courts refused to invalidate the local rules. Those courts concluded that the requirements facilitated the efficient administration of justice because nonresident attorneys allegedly are less competent and less available to the court than are resident attorneys. The Supreme Court granted certiorari. 107 S. Ct. 454 (1986). It thereafter decided that "[p]ursuant to our supervisory authority, we hold that the district court was not empowered to adopt its local rules to require members of the Louisiana bar who apply for admission to its bar to live in or maintain an office in Louisiana where the court sits." 107 S. Ct. at 2611. It found that the reasons given for the residence requirement to be unnecessary and irrational.

First, the Court stated that no empirical evidence demonstrated why the district court was justified in discriminating against one of two classes of attorneys who were members of the Louisiana bar. The Court went on to say that there is no reason to believe that nonresident attorneys who have passed the Louisiana bar exam are less competent than resident attorneys. *See* 107 S. Ct. at 2612-13. There is no suggestion that the situation is otherwise in the Virgin Islands.

The Court next concluded that it did not agree that the alleged need for immediate availability of attorneys in some proceedings requires a blanket rule that denies all nonresident attorneys admission to a district court bar. *See id.* at 2613. The Court pointed out that

improvements in communications minimizes the problem of availability, and that alternative resolutions are possible.

The Court thereupon held that the residency requirement imposed by the Eastern District is unnecessary and arbitrarily discriminates against out of state attorneys.[3]

The reasons advanced here in support of the validity of the local rules for the district court of the Virgin Islands are essentially the same as those rejected in *Heebe* for lack of inherent merit. Indeed, the district court found that the most compelling reason for excluding nonresidents was the need to have counsel available in criminal cases. The Supreme Court, however, has concluded that alternative resolutions of this problem are the answer.

Because the Court invoked its supervisory power in *Frazier v. Heebe*, in a context that must be viewed as generally applicable to the United States district courts, we have no doubt that it is binding precedent here unless the status of the district court of the Virgin Islands dictates otherwise. The district court of the Virgin Islands is, of course, not a United States District Court. It was created by an act of Congress and exercises exclusive federal jurisdiction in that Territory under the Revised Organic Act, 48 U.S.C. § 1612 (1982).

Given the integrated status of the Virgin Islands in the federal court system, 28 U.S.C. § 1291, 28 U.S.C. § 1254, we have no doubt that the United States Supreme Court has supervisory authority over the District Court of the Virgin Islands. Under 28 U.S.C.

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3. The Court went on to invalidate the in-state office requirement in the rules. We need not address that issue since the local rules of the Virgin Islands do not impose an on-island office requirement.

§ 2071 (1982), local rules adopted by United States courts, including those of the district court of the Virgin Islands, must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." *See also* 28 U.S.C. § 2072 (1982). We thus conclude that the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of 5 V.I.C. App. V, Rules 56(b)(4),(b)(5)(1982) to the extent that they require an applicant to live in the Virgin Islands for one year before applying for admission to the district court bar and to state that it is his or her intention to reside in the Virgin Islands.

The appellants argue that the supervisory power should not be exercised to invalidate the residency requirement because the supervisory power is used only in unique circumstances, usually criminal cases. This argument, however, is unpersuasive in light of the decision by the Supreme Court to employ its supervisory powers to invalidate the residency requirement imposed by the Eastern District of Louisiana. Indeed, the dissent in *Heebe* focused on whether it was appropriate to rely on the Court's supervisory powers in the case. *See* 107 S. Ct. at 2614-16 (Rehnquist, C.J., dissenting).

Moreover, we disagree with the appellants' assertion that the facts in this case dictate a different result than that reached by the Supreme Court. As indicated above, the justifications offered by the district court in this case were essentially the ones rejected in *Heebe*. Thus, even against the remote possibility that we are not bound to apply *Frazier v. Heebe* here, we believe that in the exercise of our clearly established supervisory power over the district court of the Virgin Islands, *Government of the Virgin Islands v. Bryan*, slip op. (3d Cir. May 14, 1987), we would be compelled, by parity of reasoning to that

employed in *Heebe*, to apply our supervisory power, *see LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), to invalidate the residence requirements in the rules.[4]

Accordingly, the judgment of the district court will be reversed and the case remanded with instructions to enter summary judgment in favor of the plaintiffs.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

Today the majority holds that the Supreme Court's decision in *Frazier v. Heebe*, ___ U.S. ___, 107 S. Ct. 2607 (1987), requires that we invalidate the residency requirements for admission to the Virgin Islands bar. Because I believe that the district court properly construed the Supreme Court's prior decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), that *Heebe* does not alter the applicable analysis, and that specifically, on this record, there exists a genuine issue of material fact as to whether the unique circumstances of the Virgin Islands justify the challenged residency requirement, I respectfully dissent.

I.

In *Piper*, the Supreme Court held that the exclusion of a nonresident from bar admission in New Hampshire runs afoul of the privileges and immunities clause of article IV, section 2 of the Constitution. The Court noted, however, that "'[l]ike many other constitutional provisions, the privileges and

4. In view of our determination, we need not resolve the constitutional attack on the rules based on the Privilege and Immunities and Equal Protection Clauses.

immunities clause is not an absolute.'" 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). Rather, the *Piper* Court explained that "[t]hat clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* Under the first prong of the *Piper* analysis, "[a] 'substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.'" *Hicklin v. Orbeck*, 437 U.S. 518, 525-25 (1977) (quoting *Toomer*, 334 U.S. at 396). Under the second, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a 'reasonable relationship between the danger presented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Id.* "In deciding whether the discrimination bears a close or substantial relationship to the States' objective, the Court has considered the availability of less restrictive means." *Piper*, 470 U.S. at 284.

Applying the *Piper* analysis to the facts of this case, the district court concluded that the residency requirement met the standards of *Piper* under both prongs. After argument in this case, the Supreme Court issued its decision in *Heebe*. Thereafter, we properly considered the applicability of *Heebe* to determine whether disposition was appropriate on a non-constitutional basis. Because I think that *Heebe* provides no such basis, and that the majority's analysis conveniently ignores central factual issues, I shall address the applicability of both *Piper* and *Heebe* to the facts of this case. I turn first to what I believe is the proper application of *Piper*.

II.

The district court found several "substantial reasons" justifying the residency requirement for admission to the Virgin Islands bar. In general, the district court noted that the decision of this Court in *Aronson v. Ambrose*, 479 F.2d 75 (3d Cir. 1973), "expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law [in the Virgin Islands] were substantial." Appendix ("App.") at 84. In *Aronson*, this Court rejected an equal protection challenge to the Virgin Islands residency requirement embodied in Rule 56, holding that the territory's geographic isolation and the attendant difficulties in transportation to and communication with the Islands justified the residency requirement.[1] Similarly, the district court here first found that the geographic isolation of the Virgin Islands from the continental United States remains a substantial reason justifying the exclusion of nonresident attorneys. Specifically, the district court stated:

> We are unpersuaded by plaintiffs arguments that improvements in air services and other technological advances since the *Aronson* decision

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1. The *Aronson* Court noted that

> as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

479 F.2d at 78.

> have made travel and communication to the Virgin Islands easy and accessible. The number of flights to [the] Virgin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible.
>
> Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services [that] provide for the transport of materials and documents to and from the mainland.

App. at 85.

After identifying geographic isolation as a special circumstance distinguishing this case from *Piper*, the district court proceeded further to explain why a different legal conclusion was mandated on these facts. First, the district court noted that, with the extreme delay in publication of local opinions in the peculiar context of the Virgin Islands,[2] "the ability of nonresident attorneys to keep up with developments in local law would . . . be substantially impaired by such counsel's absence from the jurisdiction." App. at 85. In other words, even the most conscientious nonresident attorney would be severely handicapped by the inadequate travel and communication services from keeping abreast of recent developments in local law. Conversely, resident attorneys, although similarly inconvenienced by such delays, have actual access to controlling slip opinions, recent statutes, rules and

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2. The district court indicated that publication delays can extend over a number of years. For example, the district court noted that the 1985 edition of the Virgin Islands Reports contains opinions rendered in 1983 and early 1984. *See* App. at 86.

regulations that are available in the clerks' offices of the respective courts or in the district court libraries.[3] *See* App. at 86; Appellees' Brief at 7. Unlike the situation in *Piper*, this Court is not asked to, and the district did not, assume that nonresidents will be less likely to know local rules and decisions, or that the nonresidents will not attempt to learn recent, unpublished opinions by having local counsel forward the decision. Instead, the district court recognized that, given the inadequate travel and communication services, including mail and telephone, to and from the Islands, the most diligent attempt by a nonresident attorney to remain current would likely be unsuccessful. The majority apparently views the delay of publication in isolation rather than in the context in which the delay occurs. In my opinion, this failure to consider the unique situation in the Virgin Islands renders the majority's determination faulty at the outset.

The district court next cited the effect of inevitable delays caused by unavailable nonresident attorneys on the burgeoning case load of the district courts as a substantial reason justifying retention of the residency requirement in the Virgin Islands. Again, the district court's determination that the admission of nonresident attorneys would exacerbate the existing administrative burden, and thus justified their exclusion, was clearly rooted in the geographic isolation of the territory from the continental United States. The district court began its assessment of the probable effect of the admission of nonresident attorneys on the Virgin Islands case load by noting the

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3. Indeed, the district court noted that "[c]opies of current statutes and rules [applicable to territorial administrative agencies] are unavailable *except* in the district court libraries." App. at 86 (emphasis added).

"vast disparity," App. at 86, between the pending cases per judgeship on the average in the United States district courts and the pending cases per judgeship in the Virgin Islands district courts for the same year.[4] Noting the "pressing responsibility upon judges of [the Virgin Islands] . . . to efficiently manage their caseloads," the district court explained further that "[i]nterruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot be countenanced." App. at 86. As indicated above, "[a] 'substantial reason for the discrimination' w[ill] not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.'" *Hicklin*, 437 U.S. at 525-26 (quoting *Toomer*, 334 U.S. at 398) (bracket in *Hicklin*). As I read the district court's opinion, the "evil" with which it associated the residency requirement was the undue delay in the administration of justice, not the increasing case load itself. Even assuming that the threatened "evil" is the large case load, however, there is no requirement that nonresidents constitute the ultimate source of the problem. That "the presence or activity of nonresidents causes *or exacerbates* the problem the State seeks to remedy," *Hicklin*, 437 U.S. at 526 (emphasis added), is sufficient as long as the

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4. There are only two federal judges in the Virgin Islands: The Honorable Almeric L. Christian, sitting in Charlotte Amalie, and The Honorable David V. O'Brien, sitting in Christiansted. The district court noted that statistics issued by the Administrative Office of the United States Court for Federal Court Management for the year 1983 indicate that there were on average 481 pending cases per judgeship in the district courts, whereas in the Virgin Islands there were 781 pending cases per judgeship. *See* App. at 86.

discrimination is reasonably designed to prevent the targeted danger. Clearly, repeated interruptions in court proceedings to accommodate travel difficulties and schedule conflicts of nonresident attorneys will disrupt the efficient movement of the court's docket and thus exacerbate the already heavy case load in the Virgin Islands. In my view, the prevention of either evil presents a legitimate and substantial reason for the discriminatory treatment of nonresidents.

The district court also mentioned the "[in]ability of the courts and the bar to monitor and insure the ethical conduct of . . . lawyers who do not reside in the territory." App. at 88. In my view, the legitimate goal of ensuring ethical conduct ordinarily may be achieved through less restrictive means. For instance, the Virgin Islands bar could charge nonresidents an enforcement fee or discipline unethical lawyers under its disciplinary rules. *See Piper*, 470 U.S. at 285. Here, however, it is unclear whether these alternatives present workable solutions in the isolated region of the Virgin Islands: neither alternative would remedy or alleviate the central problems the district court identified, namely, the difficulty of obtaining prompt correspondence through the mails or by phone with regard to any allegation of unethical conduct by a nonresident attorney. Moreover, the cost of the Islands' enforcement burden may vary wildly depending on whether the nonresident attorney resides in Florida or Oregon. And it is of course obvious that discipline cannot be imposed unless and until the allegations of unethical conduct are investigated and proved. In sum, I simply cannot conclude with confidence that the interest of the Virgin Islands bar in ensuring ethical conduct of nonresident attorneys does not constitute a substantial reason or that total exclusion is not the least restrictive means of meeting that burden.

Finally, the district court found that the "most compelling" reason for retention of the residency requirement was the Islands' interest in the enforcement of Rule 16. Under Rule 16, all active members of the Virgin Islands bar are appointed on a rotating basis to represent indigent criminal defendants. Once appointed, each attorney must accept the assignment. Substitution is not permitted absent a court order. Attorneys appointed pursuant to Rule 16 must "communicate with the defendant at his place of incarceration . . . no[] later than five days from the date of the clerk's mailing of the order of appointment." 5 V.I.C., App. V (1982). Citing the delay in mail delivery, the difficulty in securing travel arrangements and the pressures of complying with the Speedy Trial Act, 18 U.S.C. § 3161 (1982), the district court concluded that Rule 16 justifies the exclusion of nonresident attorneys from the Virgin Islands bar.

Notwithstanding the mandatory provisions of Rule 16, the majority concludes, without offering any specific suggestions, that "alternative resolutions to this problem are the answer." Maj. typescript at 7. The majority refuses to even analyze the district court's reasoning in the peculiar setting of the Virgin Islands. Instead it relies on the blanket assertion that similar arguments were rejected in the very different factual setting of *Heebe*. Maj. typescript at 6-7. I respectfully disagree with this cursory approach to a very serious question, the resolution of which will have a profound impact on the functioning of the Virgin Islands bar.

Under the first prong of *Piper*, it is clear that Rule 16 and its dual goal of ensuring adequate representation for indigent criminal defendants and the full participation of all members of the Virgin Islands' bar constitutes a substantial reason for discriminating against nonresident attorneys. This is

so, at a minimum, because of the high risk of (1) inadequate notice to the attorney of his or her assignment by virtue of slow mail delivery and (2) the nonresident attorney's failure to comply with the communication requirement of the rule, in person or otherwise, by virtue of the inadequacy of travel and telephonic services. Neither reason nor chance suggests that resident attorneys, as a class, vacation en masse. Conversely, nonresident attorneys, as a class, are by definition customarily absent from the Islands. Thus, it is, in my view, reasonable to conclude that nonresident attorneys present a much greater danger to the efficient operation of the Virgin Islands' court system than do resident attorneys, who are vacationing, ill or even irresponsible.

The tragedy of the majority's decision is that it hammers an unnecessary nail that weakens significantly the independence and the vitality of the Virgin Islands bar. Today's decision represents an unjustified intrusion upon the ability of the Virgin Islands legitimately to regulate its own bar. The unfortunate result of the majority's decision is that those lawyers who are willing to practice full time in the Virgin Islands and make their primary residence in that territory will now be required to assume a disproportionate burden in representing Virgin Islands defendants in court-appointed criminal cases. This result is inevitable whether local counsel appear in their own capacity for indigent defendants or as representatives of unavailable nonresident attorneys -- an alternative that is, of course, proscribed by Rule 16. Nor would a requirement that local counsel promptly notify nonresident attorneys of the orders of appointment address the alleged problems or alleviate the anticipated burden. Local counsel's time could be unceasingly tied up in futile attempts to contact nonresident attorneys via inadequate communication

services. Nevertheless, the majority, perhaps unwittingly, imposes this additional burden solely because appellants want the advantage of a dual practice in the mainland and in the Virgin Islands, notwithstanding the alleged inability to discharge effectively their responsibilities within the territory. In my view, there is simply no way that this Court can accommodate the desire of the appellants from New York and New Jersey -- jurisdictions that are over 1,000 miles away -- to be admitted to practice in the Virgin Islands without imposing an unreasonable burden on the rest of the Virgin Islands bar. The privileges and immunities clause, which was designed to prevent discrimination against nonresidents, here has been turned on its head to discriminate affirmatively against residents. The majority sanctions this perverse result without even the slightest inquiry into whether nonresident attorneys from jurisdictions as far away as New York and New Jersey can assume efficiently their fair share of the obligation of a Virgin Islands lawyer in criminal appointment cases. In sum, I believe that the discrimination practiced upon nonresident attorneys, under the district court's construction of the facts, is directly tailored to respond to the gravity of the threat presented by nonresident attorneys. If, then, the district court's construction of the facts is accurate, Rule 56 survives scrutiny under the second prong of *Piper* and must be sustained.

III.

The majority's unwillingness to confront the central factual issues commits an inexcusable disservice to the members of the Virgin Islands bar. The underlying premise of the district court's reasoning in support of the bar residency requirement is that travel and communications to the Islands are neither easy nor accessible. Indeed, the majority

explicitly acknowledges that "[t]he district court granted defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirement." Maj. typescript at 4. Notwithstanding this acknowledgment, the majority does "not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact." *Id.* Under the majority's analysis, peculiar factual settings have little or no relevance in determining whether the challenged provision violates the privileges and immunities clause or justifies invalidation of a rule pursuant to our supervisory powers. Yet the major thrust of the *Piper* test is the determination whether *particular* reasons justify the disparate treatment of nonresidents.

Heebe is not to the contrary. Indeed, *Heebe* reinforces my ultimate conclusion that the residency requirement for admission to the Virgin Islands bar should be upheld if the underlying premise of the district court's opinion is true.[5] In *Heebe*, the Supreme Court invoked its supervisory powers to invalidate Louisiana's residency requirement for admission to practice in the federal courts for the Eastern District of Louisiana. Under Local Rule 21.2, the Eastern District of Louisiana required that, to be admitted to its bar, an attorney must reside or maintain an office in the State. The district court in *Heebe* had determined that "the in-state attorney's admission to the bar 'does not raise the same concern for the efficient administration of justice that admission of nonresident attorneys does.'"

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5. In my view, whether *Piper* or *Hebbe* governs, the bar residency requirement for the Virgin Islands cannot be assessed properly without first determining the ease and adequacy of travel and communication services between the Virgin Islands and the continental United States.

107 S. Ct. at 2611 (quoting *In re Frazier*, 594 F. Supp. 1173, 1184 (E.D. La. 1984)). Affirming the judgment of the district court, the Court of Appeals held that exclusion of nonresident attorneys was rationally related to the district court's goal of promoting lawyer competence and availability for hearings.

On review, the Supreme Court reversed, finding both the in-state residency and the in-state office requirements unnecessary and irrational. The *Heebe* analysis, however, parallels that employed in *Piper*. First, examining the in-state residency requirement, the Court found irrelevant empirical evidence concerning the behavior of *pro hac vice* practitioners. "Experience with this category of one-time or occasional practitioners," the Court observed, "does not provide a basis for predicting the behavior of attorneys, who are members of the Louisiana bar and who seek to practice in the Eastern District on a regular basis." *Hebbe*, 107 S. Ct. at 2612. The Court also rejected the assumption that nonresident attorneys, as a class, would fail to familiarize themselves with the local rules. Instead, the Court considered the converse to be more likely because of the personal investment made by the nonresident attorney in taking the Louisiana bar and paying its annual dues. *Id.* at 2612-13. Finally, the Court found unpersuasive "the alleged need for immediate availability of attorneys" as sufficient justification for the total exclusion of nonresidents. *Id.* at 2613. Rejecting unavailability as a sufficient basis upon which to deny all nonresident attorneys admission to the district court bar, the Court specifically noted that "[a]s a practical matter, a high percentage of nonresident attorneys willing to take the state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the District Court." *Id.* (quoting *Piper*, 470 U.S. at 286-87).

On similar grounds, the *Heebe* Court rejected the in-state office requirement. The Court, noting that this requirement was not also imposed on resident attorneys, concluded that it did nothing to further the articulated goals of the rule. Namely, the resident attorney with an out-of-state office is equally as unavailable for emergency court proceedings as the nonresident attorney whose office is also located out of the state. Nor was the rule's competency concern advanced by requiring nonresidents to maintain an office within the state. Finally, the Court stated that "there is no link between residency within a State and proximity to a courthouse." *Heebe*, 107 S. Ct. at 2613. Because the office requirement did not specify that "counsel *be* in the Eastern District," there was no assurance that the location of the office within the State would be easily accessible to the courthouse. *Id.* (original emphasis).

Although the reasoning of the Court in *Heebe* makes sense in the factual context of that case, it is inapposite here. First, in the instant appeal, the parties' dispute was disposed of on summary judgment, and therefore the record is devoid of relevant evidence tending to verify the central assertions of the Virgin Islands in support of its residency requirement. More important, it is necessary to first understand and distinguish those assertions from those that were considered by both the *Piper* and *Heebe* Courts. Unlike the assumptions rejected by the Court in *Piper* and *Heebe*, the issues raised in this appeal do not turn upon bald predictions of the willingness of nonresident attorneys to remain current and competent in local or federal law. Nor do they require us to assume that nonresident attorneys will be deliberately or otherwise unavailable for emergency court proceedings. Rather, directly in issue here is the very *ability* of even the most competent and otherwise available nonresident

attorney to secure travel accommodations or effective communication services to the Virgin Islands on short notice. As noted above, both the *Piper* and *Heebe* decisions considered relevant the expectation that nonresident attorneys would endeavor to live in a reasonably convenient location. Indeed, in the context of those cases, dealing with contiguous States, such an expectation is truly plausible. The assertion of the Bar Examiner in the instant appeal, however, is that, geographically, no such location exists, *see* Appellees' Brief at 4 (a nonresident attorney "who resides a short distance outside our boundaries would be a resident of the high seas"), and further, that, practically, no such location exists because of the inadequacy of travel and communication services between the Virgin Islands and the mainland.

It is particularly disheartening that distinguished federal judges in this Circuit blatantly write off as immaterial the transportation and communication problems that continue to plague the Virgin Islands, and that have haunted all of us -- including our Clerk's Office -- for years. As Chief Justice Taft once remarked: "All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20, 37. (1921). It is not uncommon for us as judges to have mailed case files to the Virgin Islands two to three weeks in advance and learn that they still are not available when we arrive. Waiting for the connection of a phone call between the States and the Virgin Islands is often a true test of judicial patience. In effect, the majority disregards Justice Frankfurter's wise admonition that "there comes a point where this court should not be ignorant as judges of what we know as men [and women]." *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J., joined by Murphy and Rutledge, JJ.).

From the time that I first sat in the Virgin Islands as a visiting district judge in 1966 to my most recent sitting in 1987, I, and all other judges, have always meticulously planned plane schedules weeks in advance. We know that those who wait until the last minute can be left standing at the terminal gate, watching a loaded plane of vacationers depart. None of us dare to run that risk, and we should not, on this record, expect nonresident attorneys to have better fortunes in transportation and communication services. Although these comments may not relate to facts of which we may readily take judicial notice, I have yet to hear any dispute of my description of the travel and communications problems to and from the Virgin Islands. At a minimum, these are matters that should be decided on a fully litigated record after a hearing; they should not be given such short shrift in a judicial opinion. The terms "supervisory power" were never intended to be a synonym for raw judicial power exercised without regard to either rational judgments or an adequate factual record.

Unless we are to resolve the central factual issues raised by this appeal -- the ease and adequacy of travel and communications to and from the Virgin Islands -- I do not believe that we can justify invalidating Rule 56 as either unconstitutional under *Piper* or irrational or unnecessary pursuant to our supervisory powers under *Hebbe*. Thus, because I believe there exists a genuine issue of material fact, I would remand this case to the district court for a determination of the adequacy of travel and communication services. Indeed, one must not lose sight of the real interests at stake here. If the assertions of the Bar Examiner and the assumptions of the district court with regard to the quality of travel and communications services between the Virgin Islands and the continental United States are true, the complications envisioned by the district

court will jeopardize and even deprive the client of the nonresident attorney of substantial rights.[6] Thus, if these assertions were to be substantiated at trial, I would hold that the requirements under *Piper* have been met and that the residency requirement does not offend the privileges and immunities clause of article IV. Similarly, I would hold that, under *Heebe*, no basis exists upon which to exercise our supervisory powers to invalidate the residency requirement of Rule 56.

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6. In *Heebe* the Court recognized that "[a] client may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyer most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated." 107 S. Ct. at 2614 n.12. Absent evidence that such situations are widespread in the Virgin Islands, I am unwilling to invalidate the residency requirement as insubstantial, irrational or unnecessary. Nonresident attorneys are permitted to practice on a *pro hac vice* basis in the Virgin Islands. Although, accepting the district court's premise as true, these attorneys will face identical complications in making travel and communication arrangements, the disruption to the efficient administration of the Virgin Islands court system will be minimal as compared to the wholesale admission of nonresident attorneys who, unlike *pro hac vice* attorneys, bear the additional responsibility of representing indigent criminal defendants under Rule 16. *Cf. Piper*, 470 U.S. at 283 n.16 ("The nonresident who seeks to join a bar, unlike the *pro hac vice* applicant, must have the same professional and personal qualifications required of resident lawyers.").

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 206/1985

SUSAN ESPOSITO THORSTENN,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor,

Civil No. 207/1985

LLOYD DE VOS,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor.

JUDGMENT

The above captioned matters having come before the Court on the cross-motions of the parties for summary judgment, and the Court having considered the affidavits, stipulations of fact, and memoranda of law, of each of the parties, and having entered a written opinion of even date herewith now, therefore, in accordance with the aforementioned opinion of the Court, and being otherwise duly satisfied in the premises, it is hereby

ORDERED and ADJUDGED that the motion of defendant Geoffrey W. Barnard and intervenor Virgin Islands Bar Association be, and the same is hereby GRANTED,

FURTHER ORDERED and ADJUDGED, that the complaints in these consolidated actions be, and the same are, hereby DISMISSED ON THE MERITS.

DATED: December 8, 1986

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

Orinn Arnold
Clerk of Court

By: /s/ FRANK BLACKMAN
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 206/1985

SUSAN ESPOSITO THORSTENN,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor,

Civil No. 207/1985

LLOYD DE VOS,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor.

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MEMORANDUM OPINION

CHRISTIAN, Chief Judge

These consolidated actions for declaratory judgment and injunctive relief challenge the continued application of Rules 56 (b) (4) and (5) which require an applicant for admission to the Virgin Islands Bar Association to prove prior residency in the territory for a period of one year, and an intent to remain in the Virgin Islands, before the candidate will be allowed membership in the association. T. 5 App. V. R. 56(4) and (5).

The Virgin Islands Bar Association is an integrated bar association, and is comprised of all attorneys admitted to practice in this jurisdiction. T. 5 App. V. R. 51(a). With few exceptions, not relevant to this cause, attorneys who are not active members of the Virgin Islands Bar Association are barred from the prac-

tice of law in the territory.[1] Plaintiffs in these causes do not reside in the Virgin Islands and have no intention of relocating to this jurisdiction.[2] Under the rules which presently regulate admission to the bar association, plaintiffs are clearly ineligible for membership in the association.

In its present posture, this action is before the Court on cross motions of the parties for summary judgment. Plaintiffs contend that by its decision in *Supreme Court of New Hampshire v. Piper*, ____ US ____, 105 S. Ct. 1272 (1985), the Supreme Court of the United States held that the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution prohibits enforcement of any rule which makes residence in the jurisdiction a condition of admission to the bar.[3]

Defendant Geoffrey W. Barnard[4] and intervenor the Virgin Islands Bar Association[5] maintain that there is a substantial rea-

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1 An attorney who is currently in good standing as an active member of any bar of any state or territory of the United States or any foreign country, who has not suffered any disbarment or suspension of his license to practice in any jurisdiction, and who has been retained to represent a party involved in litigation filed in a court in the Virgin Islands may, in the discretion of the judge, on motion of an attorney of record, be admitted *pro hac vice* to participate in the litigation in the same manner as permitted an active member of the Virgin Islands Bar Association. T. 5 App. V. R. 51(f).

An inactive member of the Virgin Islands Bar Association, who is interested in litigation filed in a court of the Virgin Islands, may, in the court's discretion, be permitted to participate in the action as an active member of the Virgin Islands Bar Association. T. 5 App. V. R. 51(g).

2 Plaintiff Lloyd De Vos resides in New Jersey and Plaintiff Susan Esposito Thorstenn resides in New York. Each is a member in good standing of the New York and New Jersey Bar Associations. Both have taken and passed the Virgin Islands Bar Examination.

3 The constitutional rights guaranteed by the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution have been extended to the Virgin Islands by Section 3 of the Revised Organic Act, 48 USC § 1561 (1982).

4 Defendant Barnard has been made a party to this action solely in his capacity as Chairman of the Committee of Bar Examiners.

5 The Virgin Islands Bar Association joined defendant Barnard's motion for summary judgment and incorporated the arguments advanced by the

son for the claimed disparate treatment of nonresident candidates for bar admission, and that the discrimination practiced against those who do not reside in the territory bears a close relationship to that purpose. Under these circumstances, defendants argue, elimination of the residency requirement is not mandated.

A reading of *Piper* reveals that not all attempts to limit bar admissions to those who are inhabitants of the jurisdiction and intend to so remain residents are unconstitutional. The Supreme Court held in *Piper* that the opportunity to practice law is a fundamental right within the meaning of the Privileges and Immunities Clause. 105 S. Ct. at 1277. Consequently, the exclusion of nonresidents interferes with a protected privilege. *Id.* The foregoing conclusion, however, did not end the court's discussion of the matter.

The Supreme Court reasoned that "[l]ike many other constitutional provisions, the privileges and immunities clause is not absolute." *Piper*, 105 S. Ct. at 1278, *quoting Toomer v. Witsell*, 334 US 385, 396 (1948). Discrimination against nonresidents is not precluded where "there is a substantial reason for the difference in treatment" and when the degree of discrimination is substantially related to the governmental purpose. *Piper*, 105 S. Ct. at 1279, *citing*, *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 US 208, 222 (1983).

The justifications advanced by the New Hampshire court for its refusal to admit nonresidents to the bar were that nonresident members would be less likely: (i) to become and remain familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State. *Piper*, 105 S. Ct. at 1279 (1985). The Supreme Court found there was no evidence to support the state's fears that nonresident attorneys would not perform their duties with the same degree of professional

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defendant in its own motion for summary judgment. Due to their identity of interest in this case, the aforementioned parties will hereinafter be referred to as defendants.

integrity as resident lawyers. Accordingly, the Court rejected New Hampshire's proffered justifications as insubstantial.

The question of admission to the Virgin Islands Bar Association, however, poses a situation which is factually distinct from that presented by *Piper*. The United States Court of Appeals for the Third Circuit analyzed the special circumstances surrounding the practice of law in the Virgin Islands in its opinion in *Aronson v. Ambrose*, 10 V.I. 613 (3rd Cir. 1973), *affirming* 9 V.I. 254 (DVI 1972), and expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law were substantial. The Court noted,

> [t]he interest of . . . [the] territory in promoting the speedy and efficient administration of justice in its courts by assuring the competence and discipline of its bar is great and the actions of its legislature and courts toward these ends ought not to be interfered with except with the greatest caution and only if the measure in question is clearly constitutionally impermissible.

Aronson, 10 V.I. at 616.

As the Third Circuit observed in *Aronson*, the Virgin Islands are geographically isolated from the continental United States. Air travel is the only practical mode of transportation between the two. Passenger space aboard commercial airlines is limited and frequently unavailable absent reservations secured in advance. 10 V.I. 616-17.

The Court went on to state that,

> The case load of the district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

Id. at 617.

We are unpersuaded by plaintiffs argument that improvements in air services and other technological advances since the *Aronson* decision have made travel and communication to the Virgin Islands easy and accessible. The number of flights to Vir-

gin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible.

Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services which provide for the transport of materials and documents to and from the mainland.

Moreover, the ability of nonresident attorneys to keep up with developments in local law would also be substantially impaired by such counsel's absence from the jurisdiction. Unlike virtually all mainland jurisdictions, the publication of local opinion may be delayed for years. For example, the most recent publication of the Virgin Islands Reports, which was published in May of 1985, reports opinions rendered in 1983 and early 1984. More recent opinions are available only by review of the slip opinions which are maintained in the district court libraries. Publication of recent statutes and rules and regulations applicable to territorial administrative agencies are also delayed for long periods of time. Copies of current statutes and rules are unavailable except in the district court libraries.

As the Third Circuit correctly noted, the case load of the district court is ever increasing. The statistics issued by the Administrative Office of the United States Court for Federal Court Management, describing the year 1983, indicate that there were 481 pending cases per judgeship on the average in the United States district courts. This figure is compared to 781 pending cases per judgeship in the District Court of the Virgin Islands for the same year. This vast disparity places especially pressing responsibility upon the judges of this jurisdiction to efficiently manage their caseloads. Interruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot by countenanced.

Perhaps the most compelling reason for the retention of the residency requirement is the rule governing procedures for appointment of counsel in criminal cases. *See*, T. 5 App. V. R. 16. This rule requires the Clerk of the District Court to maintain a

list of the names of all attorneys admitted to practice in the Virgin Islands. Appointments are made, on a rotating basis, from the names on the aforementioned list.

All active members of the Virgin Islands Bar must be available for criminal appointments. Once appointed, each must accept the assignment. Moreover, none but the appointed attorney may appear on behalf of the criminal defendant. Counsel who declines a criminal assignment is totally barred from the practice of law in the district court. Such an attorney may not file papers or make an appearance on behalf of a client. The foregoing rules are admitting of no exception. T. 5 App. V. R 16.

It is the duty of the lawyer, once appointed to represent a defendant who is incarcerated, "to communicate with his client at his place of incarceration, as promptly as possible, but not later than five days from the date of the clerk's mailing of the order of appointment." T. 5 App. V. 16(B) (f). Often mail to the mainland takes longer than five days for delivery. Moreover, even if nonresident counsel received notice prior to the expiration of the period delimited by rule, accommodations for travel would be difficult to secure.

The requirements and obligations imposed by Rule 16 are made more critical by operation of the Speedy Trial Act, 18 USC § 3161 et seq. (1982). The Court must operate within the time constraints imposed by the act—or face the unacceptable consequences mandated by the statute. Thus far, operating with lawyers who reside in the territory, the Court has complied with the requirements of the Speedy Trial Act. Sometimes, however, the strict time constraints have barely been met and the mandatory sanctions narrowly escaped. Conformity will be virtually impossible upon admission of lawyers resident elsewhere.

Consideration of indigent criminal defendants forced to rely on nonresident attorneys is another factor in support of the residency requirement. Endless delays in court proceedings may cause serious financial difficulties for civil litigants. The burden on a criminal defendant, however, forced to endure delay because of his attorney's unavailability would cause even greater hardships.

In addition, there are ethical considerations which are served by the residency requirement. The territory does not employ full time staff to monitor and evaluate the ethical conduct of bar members. Service upon the Grievance and Ethics Committee of the Virgin Islands Bar Association is purely on a volunteer basis by members. There are no funds to investigate the conduct of lawyers who reside and practice in distant states. The ability of the courts and the bar to monitor and insure the ethical conduct of bar members would be significantly undermined by the admission of lawyers who do not reside in the territory.

For the foregoing reasons we conclude that the reasons set forth by the defendants as justifications for the residency requirement are substantial.

Moreover, the discrimination practiced against nonresidents, if indeed such be the case, is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar. It is a common occurrence, far too often the case, that persons who migrate to the Virgin Islands from the continental United States, fully intending to remain and make the Virgin Islands their place of permanent abode, depart these shores after a stay of a few months. The reason for this are many fold. For some, the tropical climate proves intolerable. Others cannot long cope with island living, given the may inconveniences and deprivations connected therewith. The extremely high cost of living exacts its own adverse influence. The overall educational system is considered by some as a serious drawback. Consequently, it is only after one has resided in this jurisdiction for at least one full year that there exists the reasonable assurance of the avowed, good faith, intention that applying attorney intends to, and will, reside in the Virgin Islands. The one year residency requirement provides the best circumstantial guarantee of an applicant's resolution to remain in the territory. Accordingly, we do not find the rules at issue in this cause to be "clearly constitutionally impermissible." *See Aronson*, 10 V.I. at 616. The requirements of one year prior residency and proof of an intent to remain in the Virgin Islands will, therefore, remain in full force and effect.

DATED: December 8, 1986

APPENDIX D

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the

Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§ 1611. District Court of the Virgin Islands; local courts; jurisdiction practice and procedure

(a) District Curt of the Virgin Islands; local courts

The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) Jurisdiction

The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612(a) and (c) of this title.

(c) Practice and procedure

The rules governing the practice and procedure of the courts established by local law and those prescribing the qualifications and duties of the judges and officers thereof, oaths and bonds, and the times and

places of holding court shall be governed by local law or the rules promulgated by those courts.

(July 22, 1954, c. 558, § 21, 68 Stat. 506; Oct. 5, 1984, Pub.L. 98–454, Title VII, § 702, 98 Stat. 1737.)

§ 1612. Jurisdiction of District Court

(a) Jurisdiction

The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United Sates, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which would constitute a criminal offense described in chapter 75 of subtitle F of Title 26 shall-constitute an offense against the government of the Virgin Islands and may be prosecuted in the name of the government of the Virgin Islands by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin Islands, notwithstanding the provisions of 1617 of this title.

(b) General Jurisdiction; limitations

In addition to the jurisdiction described in subsection (a) of this section the District Court of the Virgin Island shall have general original jurisdiction in all causes in the Virgin Islands the Jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: *Provided*, That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations.

(c) Criminal offenses; concurrent jurisdiction with local courts

The District Court of the Virgin Islands shall have concurrent jurisdiction with the courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan. If such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section.

(July 22, 1954, c. 558, § 22, 68 Stat. 506; Nov. 6, 1978, Pub.L. 95-598,k Title III, § 336(a) 92 Stat. 2680; Oct. 5, 1984, Pub.L. 98–454, Title VII, § 703(a), Title X, § 1001, 98 Stat. 1738, 1745.)

§ 1613. Relations between courts of United States and courts of Virgin Islands; review by United States Court of Appeals for Third Circuit; reports to Congress; rules

The relations between the courts established by the Constitution or laws of the United States and the courts established by local law with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided,* That for the first fifteen years following the establishment of the appellate court authorized by section 1611(a) of this title, the United States Court of Appeals for the Third Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of the Virgin Islands from which a decision could be had. The Judicial Counsel of the Third Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme

Court of the United States from all such final decisions. The United States Court of Appeals for the Third Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this section.

(July 22, 1954, c. 558, § 23, 68 Stat. 506; Oct. 5, 1984, Pub.L. 98-454, Title VII, § 704, 98 Stat. 1739.)

§ 1613a. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Third Circuit; rules; appeals to appellate court

(a) Appellate jurisdiction of District Court

Prior to the establishment of the appellate court authorized by section 1611(a) of this title, the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter prescribed by local law: *Provided*, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of the Virgin Islands or of any order or regulation issued or action taken by the executive branch of the government of the Virgin Islands with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

(b) Appellate division of District Court; quorum; presiding judge; designation of judges; decisions

Appeals to the District Court of the Virgin Islands shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The chief judge of the district court shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section 1614(a) of this title: *Provided,* That no more than one of them may be a judge of a court established by local law. The concurrence of two judges shall be necessary to any decision by the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure. Appeals pending in the district court on the effective date of this Act shall be heard and determined by a single judge.

(c) United States Court of Appeals for Third Circuit; jurisdiction, appeals; rules

The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law. The United States Court of Appeals for the Third Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Appeals to appellate court; effect on District Court

Upon the establishment of the appellate court provided for in section 1611(a) of this title all appeals from the decisions of the courts of the Virgin Islands established by local law not previously taken must be taken to that appellate court. The establishment of the appellate court shall not result in the loss of jurisdiction of the district court over any appeal then pending in it. The rulings of the district court on such appeals may be reviewed in the United States Court of Appeals for the Third Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.

(July 22, 1954, c. 558, § 23A, as added Oct. 5, 1984, Pub.L. 98–454, Title VII, § 705, 98 Stat. 1739.)

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.)

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United

States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Rule 51. Virgin Islands Bar Association: membership: by-laws

(a) The Virgin Islands Bar Association shall be an integrated bar association comprising all attorneys admitted to practice in the District Court of the Virgin Islands pursuant to the provisions of Rule 56 or by virtue of their employment in the Virgin Islands with the United States Government, the Government of the

Virgin Islands and Legal Services of the Virgin Islands, Inc.

(b) No attorney may practice law in the Virgin Islands who is not an active or government member of the Virgin Islands Bar Association or admitted pursuant to paragraphs (f) and (g) hereunder.

(c) The Virgin Islands Bar Association shall have the power to adopt by-laws not inconsistent with these rules. The by-laws as amended October 19, 1974, shall be the by-laws of the Virgin Islands Bar Association, and all further amendments to the by-laws shall be filed with the clerk of the district court within ten days of their adoption.

(d) Upon motion made by the treasurer of the Virgin Islands Bar Association, an active or government member delinquent in dues may be suspended from the practice of law by order of a judge of the District. Such suspended member may be reinstated to full active or government membership upon proof that the delinquent dues have been paid.

(e) Upon motion made by the secretary of the Virgin Islands Bar Association, an active member who is no longer domiciled, or although domiciled, ceases to maintain a law office or actively practice law in the Virgin Islands without having requested inactive status, may be suspended from the practice of law by order of a judge of the district court. Such suspended member may be reinstated to full active membership upon proof of re-establishing domicile and that he intends to maintain a law office or actively practice law in the Virgin Islands.

(f) An attorney who is currently in good standing as an active member of the bar of any state or territory of the United States or of any foreign country, who has not suffered any disbarment or suspension of his or her license to practice before any jurisdiction and who has been retained or requested to represent any party involved in any litigation filed in a court of the Virgin Islands may, in the discretion of the judge before whom such litigation has such been assigned or is pending, on motion of an attorney of record in such litigation, be admitted pro hac vice to participate in the litigation in the same manner as permitted an active member of the Virgin Islands Bar Association. An attorney admitted pro hac vice shall be bound by the grievance procedures established in the Rules of the Virgin Islands Bar Association and shall be subject to the disciplinary and contempt jurisdiction of any court of the Virgin Islands, in the course of his practice during his pro hac vice admission, whether such disciplinary action is taken before or after termination or revocation of his or her admission pro hac vice; Provided, however, That commencing with the calendar year 1980, no such attorney may be admitted pro hac vice in more than a total of three causes in any given calendar year;

(g) An inactive member of the Virgin Islands Bar Association in good standing who is interested in litigation filed in a court of the Virgin Islands may, at the discretion of a judge of the district court or a judge of the territorial court, or any court of the territory of the Virgin Islands hereinafter established by the Legislature of the Virgin Islands, be permitted to participate

in the action as an active member of the Virgin Islands Bar Association.–Added Jan. 1, 1975; Nov. 21, 1979.

Rule 56. Admission to the Bar

(b) Each applicant for examination under the preceding section must file an application with the Committee of Bar Examiners at least thirty days prior to the date prescribed for annual examination as above, in which he must allege and prove to the satisfaction of the committee that:

1. He is over the age of twenty-one;

2. He is a citizen of the United States or a resident alien, i.e., an alien who has lawfully been admitted for permanent residence in the United States;

3. He is a person of good moral character;

4. He shall have resided in the Virgin Islands for a least one year immediately preceding his proposed admission to the Virgin Islands Bar; and

5. If admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands;

6. Before commencing his law school training he had successfully completed two years of study in a college or university, or the equivalent of such study; and

7. He is the graduate of an accredited law school approved by the American Bar Association.

(c) Any applicant who fails to pass a Bar Examination may be permitted by the committee to take the

next examination but, if the applicant fails his third examination, he shall not be eligible to take any further examinations without leave of the chief judge of the district court upon a showing that he has completed such additional legal studies as the chief judge deems satisfactory. Fee for each additional examination shall be $50.00.

(d) All applicants for admission to the Virgin Islands Bar shall take the written bar examination as prescribed in paragraph (a) of this rule, as amended, and shall be eligible for admission, being otherwise qualified, upon the successful completion of the said examination.

(e) When an applicant has satisfactorily passed the Bar Examination, and has met all the other requirements of this rule, the Committee of Bar Examiners shall so certify to the district court and he shall be admitted to the Virgin Islands Bar by the court upon taking the oath (or affirmation) required of applicants for admission to the Bar of the Supreme Court of the United States.–Amended May 28, 1957; Sept. 22, 1958; Feb. 13, 1959; July 30.

§ 32. Original jurisdiction; jury trials in civil actions in territorial court

(a) Under section 22 of the Revised Organic Act, approved July 22, 1954, the district court has the original jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, and has general

original jurisdiction in all other causes in the Virgin Islands, where exclusive jurisdiction is not conferred upon the territorial court, as the inferior court of the Territory, by section 23 of the Revised Organic Act. When it is in the interest of justice to do so the district court may on motion of any party transfer to the district court any action or proceeding brought in the territorial court, and the district court shall have jurisdiction to hear and determine such action or proceeding.

(b) Any action or proceeding brought in the district court which is within the jurisdiction of the territorial court may be transferred by the district court in the interest of justice to the territorial court for the proper judicial division.

(c) If in a civil action brought in the territorial court a counter-claim or cross complaint is filed which is in excess of the jurisdiction of the territorial court the entire action shall be transferred by the municipal court to the district court which shall have jurisdiction to hear and determine both the complaint and counter-claim or cross complaint.

(d) If in a civil action brought in the territorial court wherein the matter in controversy exceeds the sum or value of $2,000, exclusive of interest and costs, the defendant would have been entitled to a jury trial if the action had been brought in the district court, and the defendant demands such a trial at the time of filing his answer, the action shall forthwith be transferred by the territorial court to the district court for such trial and determination.

(e) No jury trial shall be allowed in civil actions brought in the territorial court wherein the matter in controversy does not exceed the sum or value of $2,000.–Amended Sept. 9, 1976, No. 3876, § 5, Sess. L. 1976, p. 197; June 14, 1984, No. 4959, § 2, Sess. L. 1984, p. 172.

§ 23. [Jurisdiction of inferior courts; transfer of actions; status as committing court; bail; rules]

The inferior courts now or hereafter established by local law shall have exclusive original jurisdiction of all civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs, all criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both, and all violations of police and executive regulations, and they shall have original jurisdiction, concurrently with the district court, of all actions, civil or criminal, jurisdiction of which may hereafter be conferred upon them by local law. Any action or proceeding brought in the district court which is within the jurisdiction of an inferior court may be transferred to such inferior court by the district court in the interest of justice. The inferior courts shall hold preliminary investigations in charges of felony and charges of misdemeanor in which the punishment that may be imposed is beyond the jurisdiction granted to the inferior courts by this section, and shall commit offenders to the district court and grant bail in bailable cases. The rules governing the practice and procedure of the inferior courts and prescribing the duties of the judges and officers thereof,

oaths and bonds, the times and places of holding court, and the procedure for appeals to the district court shall be as may hereafter be established by the district court. The rules governing disposition of fines, costs and forfeitures, enforcement of judgment, and disposition and treatment of prisoners shall be as established by law or ordinance in force on the date of approval of this Act or as may hereafter be so established.—July 22, 1954, ch. 558 § 23, 68 Stat. 506.